Summary of Comments and U.S. Fish and Wildlife Service Response

Notice of Availability and Request for Comments:
Draft Environmental Assessment and Draft Oil and Gas Industry Conservation Plan for the American Burying Beetle in Oklahoma

79 FR 21480

May 21, 2014

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Summary of Comments

The U.S. Fish and Wildlife Service (Service) received five sets of comments during the 14-day comment period. The first comment was received on April 16, 2014, from Janelle

Rieland to inquire about incorrect website link within the Federal Register Notice. The website address was corrected the following day, on April 17, 2014. The Service received a second set of comments from Daniel Howard and Carrie Hall (Howard and Hall), professors of biology at Augustana College in Sioux Falls, South Dakota, on April 29, 2014; a third set of comments from the Oklahoma Department of Wildlife Conservation on April 29, 2014; a fourth set of comments from Devon Energy Corporation (Devon), a member of OIPA and participant in the ICP development, on April 30, 2014; and a fifth set of comments from the Oklahoma Independent Petroleum Association (OIPA) on April 30, 2014.

The Service received a sixth set of comments from Amy Smith (Smith) on May 19, 2014, after the comment period had closed.

ICP comments

ICP Comment 1 (Hall & Howard): Flaring of excess natural gas at night has been shown to cause direct mortality of night-flying insects, and thus should be restricted by the Service within the ABB CPA during the active season of the species. Further studies on this should be encouraged.

> *Service Response to ICP Comment 1:* The Service addressed impacts to ABBs from light and exposed flame in Section 3.2.5. To minimize these impacts, Permittees must enclose small, constantly burning flares within occupied ABB habitat. Other flares may not be enclosed based on feasibility due to size or the limited duration of the flare. These uncovered flares (e.g. during drilling or pipeline operation) have short-term, temporary impacts. Mitigation of habitat through the provision of off-site mitigation lands is expected to offset additional impacts from these flares.

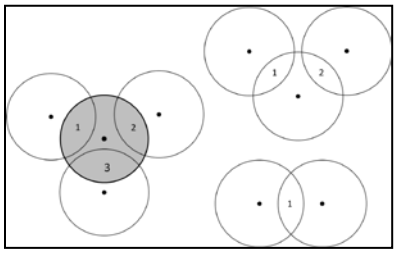
ICP Comment 2 (Hall & Howard): Areas Unfavorable for the ABB; "Pastures or grasslands that have been maintained through frequent mowing, grazing, or herbicide application at a height of 20 cm (8 inches) or less." Grazed or mowed pastures have been shown to hold high numbers of ABBs across the species range, including in Oklahoma. This statement should be clarified so that proponents and impactors are not confused and conclude that the Service is saying that simply because a grassland site has been recently disturbed through grazing, mowing, or fire, that it is unsuitable for ABBs. The term 'maintained' is ambiguous.

> *Service Response to ICP Comment 2:* Due to the life history and limited research related to habitat requirements and movements of the ABB, knowledge

on specific habitat restrictions for the ABB is limited. The Service is providing general recommendations of areas that are considered unfavorable for the ABB and will work with Permittees during the Permit application and IPP process to ensure that confusion is minimized. We invite the commenters to provide data that may help inform future decisions.

ICP Comment 3 (Hall & Howard): American Burying Beetle Conservation Priority Areas; "…only buffers that intersected three or more other buffers were included as a CPA." Does this mean that clusters of four (4) or more 10K buffers were used or three (3) or more? It is unclear.

Service Response to ICP Comment 3: CPAs include all buffers that intersected at least 3 other buffers. In the example figure below, only the shaded buffer circle would have been selected as part of the CPA.



ICP Comment 4 (Hall & Howard): The method used to determine the American Burying Beetle Conservation Priority Areas is a very simple and straightforward method to model the CPA. I applaud the Service for choosing a rather unsophisticated technique (as opposed to modeling the CPA in GARP, BioClim or MaxEnt) so that stakeholders can understand the synthesis of the model. Other techniques might be more scientifically salient, but the advantage here is that the proposed model is amenable to updates easily.

Service Response to ICP Comment 4: Thank you for your comment.

ICP Comment 5 (Hall & Howard): The Service should update the CPA annually, not every three years. This would be easy to do, and would ensure the protection/recovery of the species should new sensitive populations be discovered. This would also allow the Service to encourage/facilitate ABB surveys in the inexplicable gap areas of the current CPA, such as that associated with Wagoner Muskogee Counties and McIntosh County, which are likely artifacts of the model construction parameters rather than a reflection of the species landscape ecology.

Service Response to ICP Comment 5: Methods to delineate CPAs will be re-evaluated as new science is available. The Service currently plans to update

CPAs every 3 years to balance consistency of planning for conservation and mitigation areas while ensuring newly collected data is incorporated within a timely manner.

ICP Comment 6 (Hall & Howard): Avoid arbitrarily dismissing sites with ABB presence that fall outside of the ten year sliding window if the site(s) under consideration for removal from the CPA model have not been resurveyed in the intervening period to confirm absence. In other words, since the Service depends so heavily upon industry initiated surveys for presence data, it is not reasonable to assume absence simply because a survey has not been conducted there recently. This is tentatively addressed on page 53.

Service Response to ICP Comment 6: The Service will consider all relevant data related to ABB presence and absence for CPA designation. We invite the commenters to provide data that may help inform future decisions. When updating CPA models, the Service intends to consider that certain areas may not have recent surveys and that this alone does not indicated a lack of ABB presence.

ICP Comment 7 (Hall & Howard): Designating 5 years as a temporary impact seems unreasonably long. If the habitat is rendered unsuitable for 5 years, the likelihood of recruitment back into the site is low; a metapopulation could become locally extinct in less than 5 years if a site is not sufficiently restored. ABBs are semelparous animals that survive a single year in most cases; 5 years in beetle generations would represent ~125 years in human generations. I am not sure that we would consider a disturbance to human habitation that takes 125 years to restore as “temporary”.

Service Response to ICP Comment 7: The Service designated 5 years as the time period for temporary impacts based on the potential habitat restoration timeframe. Native warm season grasses can take several years to become established, but previous research suggests that 5 years is a realistic timeframe for restoration of these areas within the Planning Area. As discussed in Section 4.2.2.3, the Service recognizes that these impacts cause take of ABBs that may negatively affect the ABB population within the area permanently. Loss of individuals and their potential offspring, even during a 5-year or less timeframe, reduces the number of ABBs in the area and may decrease genetic diversity of the population. Therefore, the Service requires mitigation to be provided in perpetuity for these "temporary impacts" to habitat, though at a lower ratio than for "permanent impacts" to habitat.

ICP Comment 8 (Hall & Howard): It is unclear based upon the provided rationale how the Service comes up with the 32,234 acres number from the parameters outlined. The Service needs to clarify this for the stakeholder community.

> *Service Response to ICP Comment 8:* Section 3.3.4 summarizes that the estimate of 37,569 acres of disturbance from oil and gas activities within the Planning Area was developed based on Oklahoma Corporation Commission data (average number of drilled production and disposal wells from 2003 to 2012), and in close cooperation with OIPA representatives (estimates of pipeline, associated facilities, and general information). Based on the percentage of ABB habitat within the Planning Area (85.8 percent as estimated in Section 3.3.2), approximately 32,234 acres (85.8 percent of 37,569 acres) of ABB habitat may be impacted by oil and gas activities.

ICP Comment 9 (Hall & Howard): The Service does not specify how restoration of areas with temporary or permanent impacts will be monitored or evaluated. Will the Service follow up on this 5 year evaluation, since the agency is issuing the Permit under a plan that applies for only two years? Permittee reports alone would seem a less than reliable method to gauge actual compliance.

> *Service Response to ICP Comment 9*: As discussed in Section 7.3, Permittees will submit photographs of the project areas at established points prior to impacts. Photographs at these locations will be submitted annually with Permittee annual reports along with a written description of restoration actions and progress. Within 5 years of the impact start date, Permittees must submit a restoration report with additional photographs and descriptions of restored areas. The Service has the ability to monitor and evaluate restored areas covered by the Permit by review of annual and restoration reports submitted by Permittees as required (Section 7.3) by the ICP and Permits. Additionally, the Service has the ability to access the property at any reasonable hour for the purpose of conducting compliance inspections (Section 4.3.1). Inadequate or missing reports may result in suspension or revocation of a Permit, as discussed in Section 4.3.1.

ICP Comment 10 (Hall & Howard): The Service should require some level of mitigation or other action for any impact on suitable ABB habitat within the CPA, whether ABBs are found to be present at the time of survey or not. A designated conservation priority area status should imply that all impacts have probable costs to the species. This should be the primary criteria that distinguishes the CPA from the broader ICP planning area, in addition to any mitigation ratio differences. This would seem a requirement to affect species recovery.

Service Response to ICP Comment 10: Project proponents are responsible for determining whether their actions have the potential to cause take and the need for a Permit under the ESA. Participation under ESA Section 10 is voluntary. The Service recommends that project proponents avoid, minimize, and mitigate for any impacts to habitat within a CPA, but if a project proponent conducts a survey within a CPA, according to Service guidelines (when and where species would reasonably be expected to occur) that indicates ABBs are not in their project areas, the project proponent may use that information to determine whether they will seek a Permit for their actions within that area. There is no requirement under the ESA to protect unoccupied habitat unless the loss of the habitat is likely to result in take of the species.

ICP Comment 11 (Hall & Howard): ABB Range Expansion within the Planning Area. The Service has specifically named Noble and Cleveland Counties here, but should extend this to ANY county(ies) in which new records requires inclusion.

Service Response to ICP Comment 11: The Service agrees that clarification to the language in the ICP should be made. Under this ICP, Permits for the ABB may be obtained for any area within the Planning Area of the ICP. If the range of the ABB expands from the current boundaries (as seen in the Service's Information, Planning, and Conservation [IPaC] website), Permittees must consider impacts to ABBs in those areas. If the range of the ABB expands outside of the Planning Area of this ICP, take of the ABB in these areas could not be covered under this ICP and project proponents would need to seek take authorization under a different mechanism (Section 7 consultation or HCP).

ICP Comment 12 (Hall & Howard): This plan appears to offer much needed solutions to the oil and natural gas industry with respect to ESA compliance, but the Service should consider bringing non-agency scientists that work with the focal endangered species into consultation when forging new management plans such as the ICP or GCP. Scientific literature is cited in the document, albeit sometimes inaccurately, but other important studies that are relevant to this plan are not referenced. Doing so would frame the plan more firmly in the science.

Service Response to ICP Comment 12: The public comment period for this ICP is intended to solicit input from non-agency scientists, along with other individuals and entities, for conservation plans. Without specific information regarding inaccurate literature citations or relevant studies to this plan, the Service

cannot incorporate or correct that information. We invite the commenters to provide data that may help inform future decisions.

ICP Comment 13 (Oklahoma Department of Wildlife Conservation): The Oklahoma Department of Wildlife Conservation is supportive of the Fish & Wildlife Service's Industry Conservation Plan for ABB. This plan will allow oil and gas producers to move forward over the next 24 months with a universal process for operations. It is our understanding that the ICP will provide options to industry that could not be achieved because the General Conservation Plan (GCP) for ABB could not be completed prior to the 2014 Active Season.

Service Response to ICP Comment 13: Thank you for your comment.

ICP Comment 14 (*Devon 1-A, OIPA II-A*): The ICP's requirement that Permittees mitigate all impacts to the ABB in perpetuity, and the few mitigation options that meet this requirement, do not provide Permittees with sufficient flexibility to mitigate impacts. As a practical matter, of the three mitigation options identified in the ICP, the acquisition of conservation banking credits is the only feasible mitigation option for an oil and gas operator. Indeed, in the ICP, the Service recognizes that third-party mitigation lands "are usually established for a single project rather than multiple projects," such as the multiple oil and gas wells an operator may drill. See ICP, pg. 46; ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands, pg. 6. Similarly, the transaction costs of Permittee established mitigation likely will prevent Permittees from acquiring and managing their own mitigation lands. The Service should identify additional mitigation options to ensure adequate mitigation and allow operators greater flexibility to mitigate impacts. For example, operators should be able to mitigate impacts by remediating and/or restoring existing roads and well pads that are no longer in operation. In addition, Permittees should receive mitigation credit for reclaiming historically disturbed sites (e.g., agriculture fields) to convert unsuitable habitat into suitable habitat.

Service Response to ICP Comment 14: The Service believes that all three options for mitigation (Permittee-responsible, conservation banks, and third party) are feasible options for a Permittee to provide mitigation based on other species with mitigation lands (black-capped vireo, golden cheek warbler, etc.). Although the ICP and ABB Conservation Strategy identifies that third-party mitigation lands "are usually established for a single project rather than multiple projects," there are no limitations that third-party mitigation lands *must* be single project rather than multiple project. It is up to the Permittee to decide if they would like multiple projects to be included in mitigation lands managed by a third party. The

example that operators should be able to mitigate impacts by remediating and/or restoring existing roads and well pads that are no longer in operation may be applicable as mitigation for the ICP, if restored areas meet the requirements of mitigation lands and would be managed in perpetuity for the ABB. We invite the commenters to provide other options for Service review for future decisions.

ICP Comment 15 (*Devon I-B, OIPA II-B*): The fact that "temporary impacts" may affect the ABB for a period longer than five years does not necessarily mean that impacts to the ABB are permanent. The Service should authorize mitigation in place for a term longer than five years (but not permanent) to offset temporary impacts.

Service Response to ICP Comment 15: As discussed in Section 4.2.2.3, the Service recognizes that these impacts cause take of ABBs that may negatively affect the ABB population within the area permanently. Loss of individuals and their potential offspring, even during a 5-year or less timeframe, reduces the number of ABBs in the area and may decrease genetic diversity of the population. Therefore, the Service requires mitigation to be provided in perpetuity for these "temporary impacts" to habitat, though at a lower ratio than for "permanent impacts" to habitat.

ICP Comment 16 (Devon I-B, OIPA II-B): A possibility exists that there will not be enough permanent mitigation available to offset impacts. Allowing Permittees to establish mitigation that lasts for a term but is not permanent may provide Permittees with additional mitigation options other than those identified in the ICP.

Service Response to ICP Comment 16: With three potential mitigation options (Permittee-responsible mitigation lands, conservation banks, and third-party mitigation lands), the Service believes that some form of permanent mitigation lands would be available to Permittees. As discussed in the Service's response to ICP Comment 15 above, the Service believes that temporary impacts may have permanent repercussions on ABB populations and therefore requires mitigation to be provided in perpetuity for these temporary impacts. The Service is willing to review other options for mitigation for future decisions.

ICP Comment 17 (Devon I-D): The Permit and ICP should be revised to accurately list covered upstream production activities. The Permit and ICP list "drilling and hydraulic fracturing" as covered by the Permit. *See* Permit, pg. 3; ICP, pg. 10. However, this category is overly narrow because hydraulic fracturing is only one component of the well completion activities that occur after drilling concludes. Completion activities are identified elsewhere in the ICP as a covered activity. *See* ICP, pg. 13 ("All activities

associated with drilling and well completion occurs on previously disturbed areas. . . . After drilling and completion, typically 35 percent of the well pad is re-vegetated."). The Service should revise the Permit and ICP to list "drilling and completion activities" as a covered upstream activity.

Service Response to ICP Comment 17: The Service agrees and has modified the language within the ICP to address the concern.

ICP Comment 18 (Devon I-D): The discussion under the heading "Operation, Maintenance, and Decommissioning of Well Pads, Roads, and Electrical Distribution Lines" should be revised to reflect that wells, rather than "well pads," are operated, maintained, and decommissioned. "Wells" refer to oil and gas production infrastructure, which are located on well pads. "Well pads" are the cleared areas of land on which wells and associated infrastructure are located. "Well pads" are not decommissioned but are "reclaimed." The reclamation process includes restoration of the land form and vegetation. The ICP should be revised to reflect that "wells" are operated, maintained, and decommissioned and that the reclamation of well pads is also a covered activity under the Permit.

Service Response to ICP Comment 18: The Service agrees and has replaced references to "well pads" with "wells."

ICP Comment 19 (Devon I-E1; OIPA II-F1): Several inconsistencies exist between the minimization and mitigation measures identified in the ICP and Permit. First, with respect to minimization measure No. 6 (Use of Artificial Lighting), the ICP states that "activities occurring during the ABB active season within occupied ABB habitat will be limited to daylight hours." ICP, pg. 42. The Permit, however, states that "construction activities" are subject to this limitation. Permit, pg. 5. The ICP and Permit must consistently identify which activities are restricted to daylight hours.

Service Response to ICP Comment 19: The Service has revised the language within the Permit and the ICP to be consistent.

ICP Comment 20 (Devon I-E1; OIPA II-F1): With respect to mitigation measure No. 3 for post-construction restoration for temporary and permanent cover change impacts (Re-establishment of Vegetation), the ICP contains the following statement: "Preference should be given to the establishment of native vegetation if the landowner does not have specific requests and restoration of native vegetation is feasible." ICP, pg. 45. The Permit lacks this statement. *See* Permit, pg. 7. This statement should be added to the Permit.

Service Response to ICP Comment 20: The Service has revised the language within the Permit and the ICP to be consistent.

ICP Comment 21 (Devon I-E1; OIPA II-F1): With respect to the offsite habitat mitigation options described in section 4.2.2.2 of the ICP, this discussion includes much more detail than the corresponding discussion in the Permit. *Compare* ICP, pgs. 45–47 *with* Permit, pg. 8. Conceivably, a Permittee may look to the language of the Permit without realizing that additional requirements are contained in the ICP. Therefore, Devon requests that the Permit language mirror the ICP language, or simply incorporate the ICP language by reference, to avoid confusion or misunderstanding.

Service Response to ICP Comment 21: The Service has revised the language within the Permit to incorporate the language in the ICP by reference, but still only provides a summary of the 3 options in the Permit.

ICP Comment 22 (Devon I-E2; OIPA II-F2): The Service must review and revise the annual reporting requirements in the ICP and Permit to ensure consistency between the two documents. The ICP and Permit currently set forth different annual reporting requirements. *Compare* ICP, pg. 72 *with* Permit, pg. 10. For example, the ICP requires a map identifying the location of impacts but the Permit does not. *Id.* Similarly, the ICP requires "Permit number and IPP numbers" but the Permit does not. *Id.* Other inconsistencies exist as well. The Service must revise the reporting requirements in the ICP and Permit to ensure they are consistent.

Service Response to ICP Comment 22: The Service has revised the language within the Permit and the ICP to be consistent.

ICP Comment 23 (Devon I-E3; OIPA II-F3): The Permit lists the construction of pipelines within a well pad area as an upstream activity covered by the Permits. *See* Permit, pg. 3. The ICP and EA, however, do not list the construction of pipelines within the well pad area as a covered upstream activity, *see* ICP, pg. 10; EA, pg. 2-2, although elsewhere these documents generally describe this activity as an upstream production activity. ICP, pg. 15; EA, pg. 2-2. The Service must revise the ICP, EA, and Permit to clearly identify whether the construction of pipelines within a well pad area is a covered upstream activity.

Service Response to ICP Comment 23: The Service agrees and has revised the ICP, EA, and Permit language as necessary to be consistent, identifying that construction of pipelines within a well pad area is a covered upstream activity.

ICP Comment 24 (Devon I-E3; OIPA II-F3): The ICP identifies "drilling and production" activities as activities covered by the Permits ("Covered Activities"). *See* ICP, pg. 13. Elsewhere, however, the ICP only identifies "drilling and hydraulic fracturing" among the Covered Activities. *See* ICP, pg. 10. Similarly, the EA and Permit only identify drilling and hydraulic fracturing as Covered Activities. *See* EA, pg. 2-2; Permit, pg. 3. The Service must consistently describe production activities as those activities that are covered by the Permits.

> *Service Response to ICP Comment 24*: The Service agrees and has revised the ICP, EA, and Permit language to consistently identify "drilling, completion, and production" activities, based on this comment and comment number 17 above.

ICP Comment 25 (Devon I-E4; OIPA II-F4): The ICP explains that operation and maintenance activities associated with midstream development include emergency (unplanned) repairs. *See* ICP, pg. 19. The EA, however, omits emergency or unplanned repairs from the list of activities associated with the operation and maintenance of midstream pipelines. *See* EA, pg. 2-7. The Service should revise the list of operation and maintenance activities associated with midstream pipelines in the EA to include emergency repairs and ensure that any reasonably foreseeable effects to the human environment from those activities have been considered in the NEPA document.

> *Service Response to ICP Comment 25*: The Service agrees and has revised the EA to include emergency or unplanned repairs to the list of activities associated with the operation and maintenance of midstream pipelines.

ICP Comment 26 (Devon I-E5; OIPA II-F5): One assumption outlined in the changed circumstances discussion in the ICP differs from the assumption stated in the Permit. The ICP assumes that "[a]reas with 'temporary impacts' or 'permanent cover change impacts' become suitable for ABB use within 5 years of disturbance." ICP, pg. 53 (Assumption No. 3). The Permit, however, only assumes that areas with temporary impacts become suitable for ABB use within 5 years of disturbance. Permit, pg. 11 (Assumption No. 3). The Permit language should be aligned with the ICP language.

> *Service Response to ICP Comment 26*: The Service agrees and has ensured consistency between the Permit language and ICP.

ICP Comment 27 (Devon I-E6; OIPA II-F6): The ICP and EA use slightly different acreage figures to describe the size of the Planning Area. The ICP states that the

Planning Area is 22,858,163 acres while the EA states it is 22,858,240 acres. The two documents should use the same figure.

> *Service Response to ICP Comment 27*: The Service agrees and has revised the documents to be consistent. The different acreage is likely based on a rounding error and has been corrected to 22,858,163 acres.

ICP Comment 28 (Devon I-F; OIPA II-G): The ICP identifies a series of "reference documents," but the ICP is unclear whether Permittees must comply with the reference documents as a condition of the Permit and ICP or whether the reference documents simply inform implementation of the ICP. *See* ICP, pg. iii. For example, the ICP states that No Surprises assurances only apply to permittees who are "in full compliance with the ICP, Permit, and other supporting documents." ICP, pg. 52 (emphasis added). Similarly, the Permit identifies the following changed circumstance: "For all Covered Activities, the Permittee must use the most current reference documents found on the website at ***http://www.fws.gov/southwest/es/oklahoma/ABBICP***." Permit, pg. 15.

Elsewhere, however, the ICP characterizes the Migratory Bird and Eagle Avoidance Measures and Species Take Avoidance Measures as "Service-recommended avoidance measures." ICP, pg. 9 (emphasis added). The Service must clarify the relationship between the ICP and the associated reference documents by distinguishing the documents that provide Permittees with background information, recommendations, or guidance; the documents that are forms that implement the ICP; and the documents that prescribe measures with which a Permittee is required to comply.

> *Service Response to ICP Comment 28*: The Service lists reference documents immediately below the Table of Contents within the ICP. All documents contain information important to the implementation of the ICP. Applicants to the ICP must submit the *Eligibility Determination for the American Burying Beetle with* their application. Permittees must submit the *ABB Individual Project Package Checklist for the American Burying Beetle ICP, Species Assessment and Mitigation Calculations for the American Burying Beetle ICP, Calculation Spreadsheet for the American Burying Beetle ICP*, and *Estimate of ICP Implementation Costs* with their IPPs. Following IPP approval, Permittees must submit an annual report in the format of the *Example Reporting Spreadsheet for the American Burying Beetle ICP*. Additional documents provide additional information about a variety of components related to the ICP, including recommended avoidance measures for other protected species (*Oklahoma Ecological Services Field Office Migratory Birds and Eagle Avoidance Measures from Actions Associated with Oil and Gas Projects* and *Species Take Avoidance Measures for Non-covered Species Related to Selected Oil and Gas Projects within the American Burying Beetle Range in Oklahoma*), ABB survey protocol (*American Burying Beetle Oklahoma*

Presence/Absence Live-trapping Survey Guidance), and ABB mitigation lands (*American Burying Beetle Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands*).

The Service has removed the reference to "other supporting documents" found in Section 5.0 of the ICP to address the concerns of this comment.

ICP Comment 29 (Devon I-F; OIPA II-G): The Service should classify the reference documents as containing recommendations or guidance rather than mandatory prescriptions. Given the numerous inconsistencies among the documents, the ICP, and Permit, Permittees should not be bound to the terms of documents other than the ICP and Permit.

Service Response to ICP Comment 29: The Service has attempted to correct all inconsistencies among the documents. Information in associated documents are important for the implementation of the ICP as written, as associated documents are commonly referred to and relied upon within the ICP. Therefore, the Service continues to support the requirements of documents associated with the ICP. The documents that provide recommended measures (as opposed to mandatory), clearly inform Permittees whether actions are required or recommended when participating in the ICP.

ICP Comment 30 (Devon I-F; OIPA II-G): Some associated documents contain such general terms that the Service cannot require Permittees to adhere to them. Specifically, the Migratory Bird and Eagle Avoidance Measures and Species Take Avoidance Measures for Non-Covered Species are far too generic for the Service to require strict compliance with their terms. For example, the Migratory Bird and Eagle Avoidance Measures state that "[r]ecommendations on avoidance practices, timing of surveys, and the suite of species potentially affected [by construction activities] may differ accordingly" but offer no recommendations on avoidance practices or timing of surveys and do not identify any species that construction activities may affect. *See* Migratory Bird and Eagle Avoidance Measures, pg. 5. Similarly, the Take Avoidance Measures for Non-Covered Species direct that projects should be sited away from "high quality prairie habitat" for the rattlesnake-master borer moth but does not define "high quality prairie habitat." Species Take Avoidance Measures for Non-Covered Species, pg. 59. Moreover, the Species Take Avoidance Measures for Non-Covered Species for harperella and winged mapleleaf state that pesticides should not be applied "within the riparian zone" but do not define "the riparian zone." *Id.* at pgs. 17, 53. Without further guidance, Permittees cannot be expected to be bound to these vague prescriptions as terms of the Permit. Therefore, the Service must clarify that these documents provide guidance and recommendations to Permittees but do not set forth mandatory prescriptions.

Service Response to ICP Comment 30: The Service has provided the *Migratory Bird and Eagle Avoidance Measures* and *Take Avoidance Measures for Non-Covered Species* as recommendations to project proponents conducting oil and gas activities within the ABB range in Oklahoma. These specific recommendations are not strict requirements under the ICP, and as such, are potential first steps in reaching avoidance of protected species. Additional coordination with the Service may be necessary to avoid impacts to other protected species. The Service may offer recommendations during IPP review to help Permittees avoid impacts to other protected species.

ICP Comment 31 (Devon I-F): The Service cannot require compliance with the Take Avoidance Measures for Non-Covered Species unless it removes the provisions related to candidate species and species proposed for listing or clarifies that these provisions are only mandatory if the species are listed in the future. Although Service guidance advises that it may be advantageous for Permittees to include candidate species and species proposed for listing in an HCP, Permit applicants are not required to do so. See FWS Habitat Conservation Planning Handbook, pg. 3-7.

Service Response to ICP Comment 31: The Service has provided the *Take Avoidance Measures for Non-Covered Species* as recommendations to project proponents conducting oil and gas activities within the ABB range in Oklahoma. These measures include proposed species, as the Service must consider impacts to these species when conducting Section 7 consultation on our action. When developing individual HCPs, Permit applicants are not required to include proposed species, however, avoidance of these species is required for participation within the ICP developed by the Service.

ICP Comment 32 (Devon I-G; OIPA II-H): Devon and OIPA question the need for the onerous financial assurances outlined in the ICP. Most Permittees will commit funds for the principal cost of the ICP—mitigation—by purchasing conservation credits before conducting any activities that result in take of the ABB. *See* ICP, pg. 60. Because Permittees will have secured mitigation prior to conducting activities that result in impacts to ABB habitat, only a few requirements of the ICP remain to be implemented, such as monitoring. These requirements are relatively inexpensive and do not necessitate the onerous funding assurances described in the ICP. Furthermore, the Service ignores that it possesses the authority to enforce the terms of the Permits and require completion of the remaining elements of the ICP. The Permittee's failure to adhere to the terms of the ICP and Permits can result in revocation of the Permits and, possibly civil and criminal penalties. *See Nat'l Wildlife Fed'n v. Norton*, 306 F. Supp.2d 920, 926-27 (E.D. Cal.

2004). The onerous funding assurances to ensure that the ICP is implemented after mitigation has been secured are unnecessary and should be revised.

> *Service Response to ICP Comment 32*: As described in Section 6.0 of the ICP, Section 10(a)(2)(A)(ii) of the ESA requires that Permittees must specify the funding that will be available to implement actions that will be enacted to minimize and mitigate the impacts of the taking. The ESA also requires that the Service must find that "the applicant will ensure that adequate funding for the plan will be provided" (Section 10(a)(2)(B)(iii)). Therefore, while project proponents must provide mitigation prior to or concurrent with IPP approval, the Service must also find that the ICP will be fully implemented. Given that the Financial Test & Corporate Guarantee (OIPA's stated preference) is documentation of self-certification (how you met the criteria) signed by a corporate officer such as the CEO or Budget & Finance officer, the Service does not believe that funding assurances for full ICP implementation is an onerous requirement.

ICP Comment 33 (Devon I-G; OIPA II-H): Not only are the funding assurances unnecessary, the Service is requiring Permittees to demonstrate financial assurances for significantly higher costs than the actual costs of fully implementing the ICP. The Estimate of American Burying Beetle Oil and Gas Industry Conservation Plan Implementation Costs ("Estimate of Implementation Costs") suggests that Permittees must demonstrate funding assurances to cover the following costs: 1) postconstruction restoration; 2) mitigation for project impacts; 3) changed circumstances; and 4) other implementation costs. Many of these costs are unnecessary and duplicative.

> *Service Response to ICP Comment 33*: As described in Section 6.0 of the ICP, Section 10(a)(2)(A)(ii) of the ESA requires that Permittees must specify the funding that will be available to implement actions that will be enacted to minimize and mitigate the impacts of the taking. The ESA also requires that the Service must find that "the applicant will ensure that adequate funding for the plan will be provided" (Section 10(a)(2)(B)(iii)). Given uncertainties that exist related to the success of restoration and potential changed circumstances that may occur throughout the life of the Permit, the Service believes that costs estimated in the *Estimate of American Burying Beetle Oil and Gas Industry Conservation Plan Implementation Costs*, other than number 2 (Mitigation for Project Impacts), are necessary and appropriate. The Service has removed that requirement in the *Estimate of American Burying Beetle Oil and Gas Industry Conservation Plan Implementation Costs* document.

ICP Comment 34 (Devon I-G; OIPA II-H): Notably, the Estimate of Implementation Costs does not explicitly state that the Permittee must demonstrate funding for the sum of all of these costs. Conceivably, some of these funding assurances only apply if, for example, a Permittee is responsible for its own mitigation lands and not if the Permittee is acquiring mitigation credits from a conservation bank. The Service should revise the Estimate of Implementation Costs to more clearly identify the costs for which a Permittee holder must demonstrate financial assurances.

> *Service Response to ICP Comment 34*: The Service has revised the *Estimate of American Burying Beetle Oil and Gas Industry Conservation Plan Implementation Costs* to identify the costs that must be included in financial assurances.

ICP Comment 35 (Devon I-G; OIPA II-H): The requirement that Permittees demonstrate financial assurances for mitigation for project impacts is unnecessary when the Permittee utilizes mitigation credits to offset impacts. Because Permittees must purchase mitigation credits prior to the Service's approval of IPPs, *see* ICP, pg. 60, a Permittee will have fulfilled its mitigation obligation with no need to demonstrate any additional funding assurances. Therefore, the Service should revise the funding assurances required for the mitigation of project impacts (Item 2) to clarify that Permittees who purchase mitigation credits prior to IPP approval need not demonstrate financial assurances for this element.

> *Service Response to ICP Comment 35*: The "Funding for Off-Site Mitigation" within Section 6.0 of the ICP states that "If conservation banks are the selected mitigation method, documentation of credit purchase or reservation agreements must be provided to the Service prior to IPP approval." The Permittee must document the credit purchase or reservation agreements to the Service to demonstrate financial assurances for mitigation. No additional funding assurances are required for the off-site mitigation component. The Service has removed the language within the *Estimate of American Burying Beetle Oil and Gas Industry Conservation Plan Implementation Costs* related to mitigation for project impacts (Item 2).

ICP Comment 36 (Devon I-G; OIPA II-H): The requirements that the Permittees demonstrate funding assurances for post-construction restoration and changed circumstances are duplicative. To demonstrate funding assurances for changed circumstances, the Estimate of Implementation Costs requires Permittees to demonstrate funding assurances to increase mitigation ratios for all impacts that would have been considered "temporary" or "permanent cover change" to permanent impacts; thus, Permittees must demonstrate funding assurances for the difference between the cost of a

temporary or permanent cover change impact and the cost of a permanent impact. *See* Estimate of Implementation Costs, pg. 2 (Item 3, subsections A and B). To demonstrate funding assurances for post-construction restoration, the Estimate of Implementation Costs requires Permittees to calculate the cost of restoring temporary or permanent cover change impacts. *Id.* at pg. 1 (Item 1). The latter requirement ignores that if the Permittee fails to restore temporary or permanent cover change impacts in accordance with the ICP, the impact is considered permanent and the Permittee must provide additional mitigation. *See* ICP, pg. 48. This cost, however, is captured in the funding assurances for changed circumstances. There is no need for Permittees to demonstrate financial assurance for providing permanent mitigation twice. Accordingly, the Service should revise postconstruction restoration (Item 1) and changed circumstances (Item 3, subsections A and B) so that a Permittee need only demonstrate once that it can provide funding assurances of the cost to increase mitigation from a temporary or permanent cover change impact to a permanent impact.

> *Service Response to ICP Comment 36*: The Service believes it is possible that a Permittee may be required to fund both the restoration of an area following a temporary or permanent cover change impact and the increase of mitigation to that of a permanent impact. If a Permittee attempts, but fails, to restore areas with following temporary or permanent cover change impacts, they may have both 1) provided funding towards the attempted restoration and 2) be required to increase mitigation to the equivalent of mitigation for permanent impacts. In these cases, the Service is required to ensure the Permittee has provided adequate funding for both components of the ICP. Therefore, the Service has not modified the language within these sections of the *Estimate of American Burying Beetle Oil and Gas Industry Conservation Plan Implementation Costs.*

ICP Comment 37 (Devon I-G; OIPA II-H): The Service must provide additional detail regarding how costs should be calculated for emergency repairs requiring habitat clearing (Item 3, subsection C) and other implementation costs (Item 4). With respect to the cost of emergency repairs, the Service requires Permittees to estimate the "total acres of mitigation from new impact." Emergency operations, however, may not necessarily result in any impacts to ABB habitat. Furthermore, even if ABB was impacted by emergency operations, Permittees have no way of knowing at the time of IPP submittal how much habitat will be impacted. Similarly, Permittees may have difficulty determining the "average annual cost of biological/effectiveness monitoring," the "average cost of compiling the annual report," and "other minimization measures"; moreover, these estimates may vary widely among Permittees. If the Service maintains that funding assurances are necessary for these costs, Devon and OIPA suggests that the Service work

with Permittees to identify default values to streamline and standardize the required financial assurances.

> *Service Response to ICP Comment 37*: The Service agrees that estimates for emergency repairs within occupied ABB habitat, average costs of biological/effectiveness monitoring, average costs of compiling the annual report, and other minimization measures may vary widely among Permittees. Due to this variation, the Service believes that it is more appropriate to have the Permittees estimate these costs for each IPP rather than identify default values to standardize the financial assurances. The Service anticipates working with Permittees during the IPP approval process to determine adequate estimates for these costs based on previous emergency repairs on similar projects and methods used in monitoring, annual reporting, and minimization measures.

ICP Comment 38 (Devon I-H): For IPPs that include temporary and/or permanent cover change impacts, the ICP requires that Permittees submit photographs taken prior to impacts and with each annual report. EA, pgs.67, 73. The photograph specifications are unnecessarily onerous. Photographs must be in color. *Id.* The Permittee must identify the date they were taken. *Id.* Permittees must also provide the latitude and longitude of each photograph point. *Id.* For non-linear projects, Permittees must provide photographs of all four corners of the project site. *Id.* For linear projects, photographs must be provided every 0.25 miles along the project route. *Id.* Photographs must be taken in the four cardinal directions at each photograph point. *Id.* Thus, Permittees must submit 16 photographs for a single well pad, while Permittees must submit 160 photographs for a 10-mile pipeline—every year. For Permittees with multiple projects, the photograph specifications quickly become extremely burdensome. Devon requests that the Service consider alternative methods to obtaining photographic records that are less burdensome to Permittees. Devon requests that the Service reevaluate the photography specifications in the ICP to make them less burdensome on Permittees, and allow the Permittee to have flexibility in providing adequate photographic documentation.

> *Service Response to ICP Comment 38*: The Service does not consider the current methods for required photographs to be unnecessarily onerous on Permittees. Permittees are only required to submit pictures at well pads and pipelines that were within occupied ABB habitat and impacted by temporary or permanent cover change impacts. Electronic submission of reporting, including photographs, will allow Permittees to reduce workload associated with photographs, as printing and submitting hard copies is not required. The Service believes that the current methods for photographing impacts and restoration with annual reports is the most efficient and standardized method available at this time.

ICP Comment 39 (Devon I-H): Devon questions whether the Service needs photographs both in the four cardinal directions at each photograph point and all four corners of the project site. It would seem that photographs only of the impacted area would suffice.

Service Response to ICP Comment 39: The Service believes that adjusting the requirement to state that "photographs only of the impacted area" would cause an increased amount of subjectivity for the photographer regarding what area to photograph compared to the requirement of photographs in the 4 cardinal directions. Differences in the areas photographed each year may cause difficulty in comparing multiple years of photographs taken at the same point. Therefore, the Service has not adjusted the photography requirements.

ICP Comment 40 (Devon I-H): Devon questions whether the Service could obtain the information it needs through aerial imagery.

Service Response to ICP Comment 40: The purpose of photography submitted through the annual reports is to observe and analyze vegetation restoration at areas with temporary or permanent cover change impacts. Under the circumstances of this ICP, the Service does not believe aerial imagery would provide enough detail for this analysis. On the ground photography would allow the Permittee and Service to observe changes in vegetation height, composition, and comparison to adjacent area. Therefore, the Service has not replaced the reporting requirement for on the ground photography with aerial imagery.

ICP Comment 41 (Devon II): The EA and ICP contain conflicting information regarding the distance the ABB will travel to find carrion. The EA states that ABB are capable of finding a carcass up to 18.6 miles (30 kilometers) away between one and 48 hours after the animal's death. EA, pg. 3-17 (citing Jurzenski et al. 2011). The ICP, however, states that ABB can find a carcass up to 2 miles (3.22 km) away between one and 48 hours after the animal's death. ICP, pg. 23 (citing Ratcliffe 1996). These two conclusions are inconsistent with each other and rely on different scientific studies. The Service must reconcile this issue in its final EA and ICP.

Service Response to ICP Comment 41: The Service has corrected the information within the ICP to the more recent publication (Jurzenski et al. 2011).

ICP Comment 42 (Devon I-J; OIPA II-D): The ICP and its supporting documents make clear that only activities that are fully contained within ICP Planning Area may be

covered by the Permit. ICP, pg. 10; Eligibility Determination for the ABB ICP, pg. 2. The Service should provide its rationale for this position, which is unclear and must be explained. If the Service is attempting to narrow the scope of the impacts analyzed in the EA or its Section 7 consultation, limiting the authorization is not the way to do so.

> *Service Response to ICP Comment 42*: Under NEPA, the Service must examine the direct, indirect, and cumulative effects of its actions (in this case approving the ICP and subsequent issuance of Permits) on the human environment. NEPA further requires the Service to analyze the effect of a proposed action on the affected environment, which in this instance is the Planning Area. While there are no direct impacts from the Service's action, we have analyzed the indirect effects we anticipate will result from ICP implementation. To authorize an activity that requires analysis under NEPA, the whole project must be within the Planning Area analyzed. Therefore, we cannot cover projects that are not fully contained within the Planning Area.

ICP Comment 43 (Devon I-J; OIPA II-D): The Service should explain that projects with termini outside of the Planning Area require case-by-case review by the Service to determine whether the EA and Section 7 consultation associated with the ICP adequately analyzed the project's impacts; if the EA and Section 7 consultation did not consider impacts of specific projects with termini outside of the project area, additional National Environmental Policy Act ("NEPA") analysis and/or Section 7 consultation may be necessary. This approach provides Service with the flexibility to consider projects with termini outside of the Planning Area while still limiting the scope of the EA and Section 7 consultation to a manageable amount.

> *Service Response to ICP Comment 43*: To participate in the ICP, projects must be fully contained within the Planning Area, for the reason stated above. For projects with termini outside of the Planning Area, project proponents should seek an alternative mechanism for ESA compliance (an HCP or section 7 consultation).

ICP Comment 44 (Devon I-K): Devon recognizes the practical difficulties of managing incidental take authorizations for a general conservation plan ("GCP") such as the ICP. Nevertheless, Devon observes that the ICP's method for authorizing take may not align with the protections the ESA affords Permittees. The ICP authorizes impacts to 32,234 acres of occupied ABB habitat. ICP, pg. 65. Each Permit issued under the ICP may authorize impacts to a specific number of acres of habitat or simply state that take under that particular Permit is subject to the ICP's general 32,234-acre take authorization for all Permits issued under the ICP. Under this approach, the take authorization under

one Permit may be prematurely proscribed by the activities of other operators under separate Permits. If, for example, Devon receives a Permit authorizing 5,000 acres of take, and Devon has only developed 2,500 acres when Devon's activities and the activities of other operators collectively result in impacts to 32,234 acres of ABB habitat, the take allowed under Devon's Permit would be effectively limited to half its stated amount due to actions taken by other Permittees.

Under the ESA, take authorizations attached to Permits must reflect the take actually authorized under the Permit, not take caused by other projects or actions. 16 U.S.C. § 1536(b)(4)(C)(i) (requiring incidental take statements to specify "the impact of such incidental taking"); *see Wyoming Outdoor Council v. Bosworth*, 284 F. Supp. 2d 81, 84 (D.D.C. 2003) ("If the FWS finds no jeopardy, it nonetheless must provide the agency with a statement indicated any incidental take of the species *resulting from the proposed action* . . . ." (emphasis added)). Similarly, the Service must ensure that any measures proposed for authorizing take—such as acreage disturbance limitations—are "correlated with take caused by the project" and "reflect the take actually caused by the project." *South Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1280 (E.D. Cal. 2010). This process requires establishing a "causal link" between the take authorization in a Permit and the actual take that occurs as a result of the permitted activity. *Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1250 (9th Cir. 2001) (disapproving of a take authorization measure based on general "ecological conditions" in the project area, which the court held were factors outside of applicant's control).

With respect to the ICP, there exists a very real possibility that the activities of other operators could prevent Devon from reaching the maximum amount of take authorized by its Permit. Take caused by the activities of other operators is not authorized under Devon's Permit and thus is not "correlated with take caused by [Devon's] project," and does not "reflect the take actually caused by [Devon's] project." *South Yuba River Citizens League*, 723 F. Supp. 2d at 1280. Rather, the actions of other operators are totally outside of Devon's control. The Service also cannot establish a "causal link" between the take caused by other operators and the take authorized under Devon's specific Permit. *Ariz. Cattle Growers*, 273 F.3d at 1250. Although Devon understands the practical difficulties of managing a workable take authorization for a GCP such as the ICP, Devon notes the potential inconsistencies between this take authorization and established case law under the ESA that protects Permittees.

> *Service Response to ICP Comment 44*: While each Permit will authorize take/impacts up to the total that may be authorized under the ICP (32,234 acres), the specific amount of take authorized will depend on the number of acres

requested – ***and approved*** – in each IPP. The Service will keep a record of the specific amount of take approved, which will be available on the website. Once approved, companies may impact their allotted number of acres, regardless of that used by any other company, provided the Permit is being fully adhered to and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild (ESA § 10(a)(2)(B)(iv)).

ICP Comment 45 (Devon II-A; OIPA III-A): The ICP should correctly recite regulatory language related to the No Surprises assurances rather than paraphrasing the rule. As drafted, the ICP misstates the assurances provided with an Permit, changed circumstances procedures, and procedures for unforeseen circumstances. The Service should review and ensure that the ICP correctly reflects the regulatory language at 50 C.F.R. § 17.22(b)(5).

The ICP states: "[N]o Surprises assurances do not apply when a continuing activity is likely to jeopardize the continued existing and recovery of an endangered or threatened species or result in the destruction or adverse modification of designated critical habitat." ICP, pg. 52. This statement imprecisely characterizes 50 C.F.R. § 17.22(b)(8). This rule states that the Service cannot revoke a Permit (not that "No Surprises assurances do not apply") unless continuation of the permitted activity (not "a continuing activity") will appreciably reduce the likelihood of the survival and recovery of the species in the wild. *See id.* (citing 16 U.S.C. § 1539(a)(2)(B)(iv)). Although the differences are slight, Devon requests that the Service adhere to the regulatory language.

Service Response to ICP Comment 45: The Service agrees and has corrected the language to reflect the language in 50 C.F.R. § 17.22 related to no surprises assurances.

ICP Comment 46 (Devon II-A; OIPA III-A): The description of changed circumstances erroneously characterizes the Service's obligations under the No Surprises rule. The ICP states:

If the Service determines that additional conservation measures not provided for in the agreement are necessary to respond to changed circumstances, the Service will not require any conservation measures in addition to those provided for in the agreement without the consent of the Permittee, provided the agreement is being properly implemented.

ICP, pg. 58 (emphasis added). This discussion should also note that the Service will not require any "mitigation" measures not provided for in the agreement. *See* 50 C.F.R. § 17.22(b)(5)(ii).

Service Response to ICP Comment 46: The Service agrees and has corrected the language that the Service will not require any mitigation measures not provided for in the agreement.

ICP Comment 47 (Devon II-A; OIPA III-A): The ICP misstates requirements in the event of unforeseen circumstances. The ICP states that the Service has the "responsibility" of demonstrating unforeseen circumstances exist. In fact, the regulation states that the Service has the "burden" of demonstrating unforeseen circumstances exist. *See* 50 C.F.R. § 17.22(b)(5)(iii)(C). The Service should revise the ICP to use the correct regulatory language. Additionally, although the ICP states that in the event of unforeseen circumstances, the Service will work with Permittees to develop an appropriate response to new conditions, *see* ICP, pg. 59, the ICP entirely omits the constraints on the measures that the Service may require of Permittees. The ICP must include the regulatory language addressing unforeseen circumstances in 50 C.F.R. § 17.22(b)(5)(iii)(B):

If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the [Service] may require additional measures of the Permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the Permittee.

The No Surprises assurances and the Service's limits to react to changed and unforeseen circumstances are material to the ICP and the Permit. The ICP must be revised to incorporate the correct regulatory language.

Service Response to ICP Comment 47: The Service has revised the language in the ICP to incorporate the correct regulatory language.

ICP Comment 48 (Devon II-B; OIPA III-B): The ICP should include a timetable by which the Service commits to process IPPs. As drafted, the ICP provides Permittees with no guidance about the length of time necessary for the Service to approve IPPs. This information would be useful so that Permittees can plan accordingly and avoid unexpected delays to their operations.

Service Response to ICP Comment 48: The Service is unable to provide a timetable by which the IPPs will be processed. A variety of factors could influence the duration of the Service's review, including the number of IPPs received at a given time. The Service will attempt to review and process Permit applications and IPPs as quickly as possible.

ICP Comment 49 (Devon II-C): The Service should clarify when IPPs are necessary for operation and maintenance activities. The ICP states that Permittees may "lump" operation and maintenance activities for multiple projects into one IPP and that the IPP must include a general description of the types of activities, estimate the size and frequency of the activities, and typical impact of the activities. ICP, pg. 67. The ICP, however, does not specify when or why a Permittee would require an IPP solely from operation and maintenance activities.

Operations and maintenance of upstream facilities include planned upgrades to existing equipment and unplanned repairs, but they "typically occur within the existing well pad." *See* ICP, pg. 14. Therefore, operation and maintenance activities for upstream activities should not impact ABB habitat. Moreover, presumably operation and maintenance of new facilities will be covered by IPPs prepared for construction of these new facilities. The Service must clarify whether an IPP is necessary for operation and maintenance activities for upstream facilities and, if so, why an IPP is necessary. It may be useful for the Service to more specifically identify which operation and maintenance activities may require an IPP.

The ICP also states that take associated with operation and maintenance activities must be mitigated prior to impact: "Following operation and maintenance IPP approval, Permittees must ensure that take associated with these activities is appropriately mitigated prior to impacts." ICP, pg. 67. This statement ignores that operations and maintenance of upstream facilities typically occur within the existing well pad, *see* ICP, pg. 14, and therefore will not impact ABB habitat. The Service must revise the ICP to explain when IPPs are necessary for operations and maintenance activities.

Service Response to ICP Comment 49: The Service has added language to the paragraph on page 67 related to IPPs for operation and maintenance activities to explain when IPPs may be needed. The Service anticipates that some Permittees may choose to apply for take coverage for existing projects where construction has already been completed. These projects may submit IPPs that are solely related to operation and maintenance activities.

For upstream facilities, although operations and maintenance typically takes place within the existing well pad, it is possible that erosion or other maintenance issues could require impacts causing take to ABB outside of the existing well pads. See discussion under "Operation, Maintenance, and Decommissioning of Well Pads, Roads, and Electrical Distribution Lines," heading in Section 2.1.2. For these instances, Permittees may choose to complete an IPP for operation and maintenance. An IPP is only necessary for operation and maintenance activities for which the Permittee wishes to receive take authorization.

ICP Comment 50 (Devon II-D): The ICP states that applicants must agree to implement avoidance, minimization, and mitigation actions described in the ICP; however, the ICP does not identify avoidance measures. The reference to avoidance actions should be removed.

Service Response to ICP Comment 50: The Service's reference to "avoidance actions" on Page 4 states "This ICP describes a range of projects for which avoidance actions alone may not be sufficient to prevent take of the ABB, and describes actions that can serve to minimize and mitigate the impacts of such taking to the maximum extent practicable." The Service does not agree that this sentence states that applicants must agree to implement avoidance measures and therefore have not changed the language regarding avoidance measures on this page. If impacts to ABB habitat can be avoided there is no need for a Permit.

ICP Comment 51 (Devon II-D): The ICP states that projects are ineligible to participate in the ICP if they will result in take of "non-covered, federally-listed, regulated, and protected species." The description "non-covered, federally-listed, regulated, and protected" is confusing. Take of certain species with status under the ESA, such as candidate species and species proposed for listing, is not prohibited. Although the Service has recognized there are "advantages" to including unlisted species in a habitat conservation plan, it is not required to do so. *See* Habitat Conservation Planning Handbook, pg. 3-7. The ICP should use more specific language such as: "species listed as threatened or endangered under the ESA or species protected by the Bald and Golden Eagle Protection Act or Migratory Bird Treaty Act."

Service Response to ICP Comment 51: The Service has provided the *Take Avoidance Measures for Non-Covered Species* as recommendations to project proponents conducting oil and gas activities within the ABB range in Oklahoma. These measures include proposed species, as the Service must consider impacts to these species when conducting Section 7 consultation on our action. When developing individual HCPs, Permit applicants are not required to include proposed species, however, avoidance of

these species is required for participation within the ICP developed by the Service.

ICP Comment 52 (Devon II-D): The ICP states: "Permittees under this ICP will work with the State Historic Preservation Office and Tribal Historic Preservation Offices to overcome any impacts to historical and cultural resources." This statement inaccurately summarizes obligations under the National Historic Preservation Act ("NHPA"). The ICP should be revised to state: "Permittees under this ICP will work with the Service, State Historic Preservation Offices, and Tribal Historic Preservation Officers to assist the Service in fulfilling the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations at 36 C.F.R. part 800."

> *Service Response to ICP Comment 52*: The Service has replaced the language within the ICP to state that Permittees under this ICP will work with the Service, State Historic Preservation Offices, and Tribal Historic Preservation Officers to assist the Service in fulfilling the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations at 36 C.F.R. part 800.

ICP Comment 53 (Devon II-D): The ICP states: "Activities permitted through this ICP will avoid impacts to Indian sacred sites and not limit access to Indian sacred sites on Federal lands." This language appears to misstate the requirements of Executive Order No. 13007, 61 Fed. Reg. 26,771 (May 29, 1996), which imposes obligations on federal agencies when managing federal lands. Section 1(a) of the Executive Order states: "In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." The Service should align the language of the ICP with the responsibilities imposed on the Service by the Executive Order and any other applicable Executive Orders (such as Executive Order No. 3206 (June 5, 1997)).

> *Service Response to ICP Comment 53*: The Service agrees and has replaced the language in the ICP to address the concern.

ICP Comment 54 (Devon II-D): Section 10(a)(2)(A)(iii) of the ESA requires applicants to describe "what alternative actions to the taking the applicant considered, and the reasons why such alternatives are not being utilized." The ICP states that an alternative to the proposed incidental taking is for project proponents to avoid actions that could result in take of ABB. The ICP, however, should also note that an alternative to the taking proposed under the ICP is the Service's consideration of incidental take on a case-

by-case basis. This alternative would likely result in piecemeal permitting and inconsistent conservation measures; consequently, it would not yield the comprehensive and coordinated conservation of the ABB as provided by the ICP.

> *Service Response to ICP Comment 54*: A distinction should be made between alternatives to the taking (Section 1.7) within the ICP and alternatives to the Service's actions (discussed within the EA). The Service believes that consideration of incidental take on a case-by-case bases is an alternative to the permitting process rather than an alternative to the taking. Both the programmatic approach of an ICP and individual HCP approach involves the taking of the species. Therefore, the Service has not included this alternative within the Section 1.7, Alternatives to the Taking, within the ICP.

ICP Comment 55 (Devon II-D): The following sentence should be clarified by adding the bolded text to make clear that monitoring for invasive species is only required for temporary or permanent cover change impacts and is required during the five-year period during which restoration must occur:

Because vegetation composition may change the carrion base (small mammal and bird composition) of an area, Permittees will monitor project sites **with temporary or permanent cover change impacts** following post-construction restoration and document any invasive species . . . in their annual reports during the **five-year** restoration period.

> *Service Response to ICP Comment 55*: The Service agrees and has added the requested language within the ICP.

ICP Comment 56 (Devon II-D): With respect to third-party mitigation lands, the ICP states: "The mitigation land sponsor (landowner or easement holder) is responsible for ensuring the success of and managing the approved mitigation land in perpetuity." Devon suggests that the Service replace this language with clearer language found in the ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands: "The mitigation land sponsor (landowner or easement holder) <u>assumes liability</u> for the success of the mitigation land with the approval of the Service." ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands, pg. 6 (emphasis added).

> *Service Response to ICP Comment 56*: The Service agrees and has modified the language as requested within the ICP.

ICP Comment 57 (Devon II-D): The ICP explains that Conservation Priority Area

boundaries will be re- evaluated every three years and may be adjusted. If CPA boundaries are adjusted, "Permittees will mitigate appropriately for new impacts based on the location of project impacts, according to the latest CPA delineation method" (emphasis added). The ICP should further clarify that if impacts have occurred but restoration of temporary or permanent cover change impacts is not complete, the new CPA boundaries will not apply and additional mitigation credits will not be required.

> *Service Response to ICP Comment 57*: The Service agrees and has added language as requested within the ICP.

ICP Comment 58 (Devon II-D): Section 5.1.6 explains that if invasive species are adversely affecting the ABB to a degree not contemplated in the ICP in areas that have been restored, Permittees will work to develop an invasive species control plan. The ICP should limit the timeframe after restoration is complete when Permittees will be required to develop an invasive species control plan. It would be unreasonable to require Permittees to develop an invasive species control plan a decade after restoration is complete.

> *Service Response to ICP Comment 58*: The Service believes that invasive species could potentially impact the ABB to a degree not contemplated within the ICP for the life of the Permit. Therefore, the Service does not believe it is appropriate to limit the timeframe for a potential invasive species control plan to the 5-year restoration period.

ICP Comment 59 (Devon II-D): The IPP Checklist states that IPPs must contain a "[m]ap and description of the area of Permit coverage (location of impacts), including photographs." Devon asks that the Service confirm that it intends to require Permittees to submit maps with the area of Permit coverage rather than maps of an individual project area.

> *Service Response to ICP Comment 59*: The Service has clarified the requested map area described on Page 67 of the ICP. The Service requests maps and description of the area where impacts will occur (project area).

ICP Comment 60 (OIPA): We applaud the Service's proposal to develop a conservation plan to address potential impacts to the ABB, while simultaneously streamlining the Endangered Species Act ("ESA") permitting process for industry. OIPA welcomes the Service issuance of an ICP for the ABB in Oklahoma and recognizes the efforts of the Service to address the urgent needs of industry to have a mechanism to obtain Section 10 Permits for this species.

Service Response to ICP Comment 60: Thank you for your comment.

ICP Comment 61 (OIPA I-B): The expanded range and confirmed occurrences of ABB in Oklahoma significantly overlap the areas of extensive oil and gas development during the 25 years since the listing of the ABB, which is a strong indicator that the oil and gas industry is not an appreciable threat to the ABB. However, the ICP presumes that the relatively disperse habitat impacts associated with the oil and gas activity should be a proxy for actual ABB takes; this directly conflicts with the fact that the ABB range is expanding into active areas of oil and gas development and therefore significantly overstates the impacts of the oil and gas industry.

Service Response to ICP Comment 61: It is unknown whether the ABB range has expanded into new areas or if ABBs previously occupied these areas, but had not been documented because survey data for carrion beetles is somewhat limited. Therefore, the Service must use the best available science when analyzing actions that are likely to result in take of ABBs.

ICP Comment 62 (OIPA I-B): The ICP presumes that fragmentation of habitat caused by oil and gas activities is a contributing threat to the ABB and therefore penalizes the conversion of forested ABB habitat to herbaceous ABB habitat; this again conflicts with the fact that the ABB range is expanding into active areas of oil and gas development. Moreover, this presumption misconstrues the ABB's biology because, as Service recognizes, the species thrives in both habitat types. Given that the ABB has not demonstrated a preference for one habitat over the other (i.e., forested habitat is no more valuable to the species than herbaceous habitat), Permittees should not be penalized for so-called "habitat conversion." Such mitigation requirements do not satisfy the Service's obligation to ensure that mitigation is based on a "sound biological rationale" and that it be "commensurate with the impacts" addressed. See U.S. FWS & NMFS, Habitat Conversion Planning Handbook at 3-19 (1996).

Service Response to ICP Comment 62: As described in Section 3.3.3, man-made changes to land cover types can create intense, sudden contrast between land cover types (i.e., a grassland ROW fragmenting a contiguous stand of forest habitat), compared to natural patchy landscapes. These cover type conversions often occur within the ROWs of linear infrastructure, including electric transmission lines, pipelines, and roadways. Evidence suggests that permanent change in cover types, even if they are both native to the area, can increase threats to ABBs (Trumbo and Bloch 2000) by increasing the number of invasive plant species present (Marvier et al. 2004), reducing the carrion prey base of the

appropriate size for ABB reproduction (Oxley et al. 1974), or increasing the scavenger competition for carrion (Kozol 1995, Ratcliffe 1996, Amaral et al. 1997, Bedick et al. 1999) necessary for ABB reproduction. Additionally, changing the vegetation cover type from forest to grassland provides access, which may increase human use and presence (including use of vehicles) in the area. Therefore, the Service believes that there is "sound biological rationale" for the increased mitigation ratio for impacts causing a permanent change in cover type.

ICP Comment 63 (OIPA II-C): Section 3.3.1 "Use of Impacts of Habitat as a Proxy or Take" states, "For the purposes of this ICP, the Service defines incidental take in terms of the number of occupied acres disturbed. The Service considers using acres of habitat disturbed as an appropriate surrogate, because habitat disturbance is expected to be the primary cause of take resulting from the Covered Activities." This language expands the definition of take beyond what is allowed in the regulations. A more correct statement is that which the Service has previously used: "Because quantification of ABB individuals impacted incidental to Covered Activities is not possible given available data, the Service believes that relying on impacts to ABB habitat is a suitable surrogate to estimate the amount of take that is likely to occur."

Service Response to ICP Comment 63: The Service has removed the language and replaced it with the requested language.

ICP Comment 64 (OIPA II-C): On the Cover Sheet, the most recent revision reads, "For the purposes of this ICP, the Services defines incidental take in terms of the number of acres of occupied ABB habitat disturbed (Section 3.3.1)." This language is incorrect and should be revised to eliminate the impression that the Service has the authority to expand the definition of take, even if it is just "for the purposes of this ICP."

Service Response to ICP Comment 64: The Service agrees and has corrected the language on the cover sheet of the ICP.

ICP Comment 65 (OIPA II-C): OIPA requests that the Service clarify in the ICP that the choice to participate in the ICP through the Permit process does not assert that individual projects performed by the applicant must be covered under the ICP because, under Section 10, applicants retain the rights to determine that a particular project will not result in take and to seek alternate compliance mechanisms for projects that they determine may result in a take. We further ask the Service to clarify that a project proponent's choice not to participate in the ICP for any given project located in occupied

ABB habitat does not necessarily mean, as a matter of law, that the project will cause incidental take of the ABB.

> *Service Response to ICP Comment 65*: The Service has added language within the ICP to clarify that participation in the ICP and an application for take authorization is voluntary. If project proponents can avoid activities in occupied ABB habitat that could result in take, they can decide whether or not they need take authorization. However, should the applicant ultimately elect not to obtain a Permit, and an unauthorized take attributable to project activities occurs, the responsible individuals or entity may be liable under the enforcement provisions of the ESA. Therefore, the Service does not believe it is appropriate to broadly state that projects occurring within occupied ABB habitat will not necessarily cause take of the ABB.

ICP Comment 66 (OIPA III-C): The exclusion of spills and releases from ICP coverage is based on the false assumption that spills are inherently unlawful. While spills and releases are undesirable both from a business and an environmental standpoint, only a small minority of spills and releases result in water or air quality violations. The irony of the Service stance on this issue is that inadequate response to a spill or release is what is most likely to be the only unlawful activity associated with a spill or release, and the failure of the Service to cover responses to spills and releases create a regulatory impediment to a lawful response. Since very few spills or releases trigger EPA involvement, the assumption that responses to spills or releases can generally be performed under Section 7 consultation is also false.

> *Service Response to ICP Comment 66*: The Service expects that spills and releases would be accidental events, rather than legal activities. Therefore, the Service has chosen to not include take coverage for spills, releases, and response to such spills or releases.
>
> The Service does not assume that spills or releases can generally be performed under Section 7 consultation through the EPA, rather, the Service states in Section 2.3 that "If the Environmental Protection Agency (EPA) is involved with a response, then EPA may consult with the Service through Section 7 of the ESA regarding effects to threatened and endangered species associated with response activities. Incidental take could be addressed through this Section 7 consultation, if appropriate."

ICP Comment 67 (OIPA III-D): The mitigation measures impose restrictions on flares without any scientific evidence that flares increase ABB mortality. Flares cannot be equated with "artificial lighting."

> *Service Response to ICP Comment 67*: The Service has added a citation to the ICP related to insect attraction to light. Lighting from gas flares alters the natural light regime of an area, disrupting foraging behavior and potentially increasing predation on ABBs. Minimization measures are intended to minimize take of the ABB. While the Service's definition of take includes mortality ("kill"), it also includes harass and harm. Therefore, the Service believes that including minimization measures reducing the light associated with flares is appropriate.

ICP Comment 68 (OIPA III-D): The issue of grass length is used for 2 different purposes: 1) for determining unfavorable habitat if the vegetation is less than 8", and 2) as a mitigation to minimize take of the ABB by leaving vegetation at least 8" tall when mowing even during the dormant season. The historic explanation for the first use has been that vegetation shorter than 8" allows other prey to remove the carrion before the ABB can get to it. The explanation for the second use is that it prevents desiccation of the ABB that are below grade. It seems unlikely that two different issues of concern would result in identical criteria. The choice of 8" for preventing desiccation is based on a study that did not even address vegetation height and therefore the choice of 8" seems to have been arbitrarily chosen.

> *Service Response to ICP Comment 68*: The 8" vegetation height description delineating vegetation that may be ABB habitat (if vegetation is over 8" in height) from that which may be unfavorable for use by ABBs (if vegetation is under 8" in height) is a general characteristic based on best professional judgment of Service biologists. The Service believes that maintaining vegetation height at 8 inches or higher is a component of ABB habitat for multiple reasons, including 1) maintaining soil moisture for carcass burial, support of reproductive chambers, and avoidance of desiccation; 2) maintaining habitat for small mammals and other carrion sources for the ABB; and 3) decreasing the ability of competitors to visually locate carrion. Additionally, the Service believes that this standard measurement for vegetation height is feasible for project proponents to implement due to the height of tractor equipment frequently used to maintain vegetation within the project areas.

ICP Comment 69 (OIPA IV): Thank you for the opportunity to provide these comments regarding the ICP/EA for the ABB in Oklahoma. OIPA and its members appreciate the

Service's careful consideration of these views and support this important effort. OIPA believes a properly developed and completed EA and ICP will simultaneously enable critical energy projects to move forward while achieving the Service's obligation to protect the ABB.

Service Response to ICP Comment 69: Thank you for your comment.

ICP Comment 70 (Smith): I wish to commend you for the "Interim Oil and Gas Industry Conservation Plan" (ICP). I sincerely hope that this encourages the development and application of conservation measures that enhance the American burying beetle (ABB) in Oklahoma; adds to our knowledge of the species; and streamlines the process for staff. It is clear that much thought has gone into the ICP which incorporates the many documents that have emerged over the last few years.

Service Response to ICP Comment 70: Thank you for your comment.

EA Comments

EA Comment 1 (Devon III-A): The Service may conclude that approval of the ICP and issuance of Permits will not significantly impact the human environment. In the draft EA, the Service assessed the impacts of approving the ICP and issuing Permits on a variety of resources, including geology, soils, water resources, water quality, air quality, vegetation, wetlands, wildlife, threatened and endangered species, land use, aesthetics, noise, socioeconomics, environmental justice, tribal resources, and cultural resources. *See* EA, chs. 3, 4. It compared these impacts to the impacts of the no-action alternative, which would result from operators either avoiding take of the ABB or developing Habitat Conservation Plans ("HCPs") on a case-by-case basis. *See id.*; EA, pg. 2-1; Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,027 (March 23, 1981) (directing inclusion of "predictable actions by others" in the no-action alternative); *see also Young v. Gen. Serv. Admin.*, 99 F. Supp.2d 59, 74 (D. D.C. 2000). Based on this analysis, the Service appropriately concluded that impacts from approval of the ICP and issuance of Permits will not be significant. EA, pgs. 4-4, 4-6, 4-8, 4- 9, 4-12, 4-14 – 4-15, 4-19, 4-22 – 4-23, 4-27 – 4-28, 4-31, 4-32 – 4-33, 4-34, 4-35, 4-35 – 4-36, 4-37, 4-38. This finding is consistent with the Service's guidance. "Normally, the Service believes that analysis at the level of an EA will be sufficient for HCPs." Habitat Conservation Planning Handbook, pg. 5-3. Accordingly, the Service appropriately concluded that approval of the ICP and issuance of the Permit will not significantly impact the human environment.

Service Response to EA Comment 1: Thank you for your comment.

EA Comment 2 (Devon III-B): The EA repeatedly suggests that approval of the ICP and issuance of Permits will result in oil and gas activities in unsuitable or unoccupied ABB habitat. For example, the EA states: "No more than a cumulative 37,569 acres (15,204 hectares) of the 35,716-square mile Planning Area . . . would be directly impacted by covered activities." EA, pg. 4-1. This statement is incorrect. Oil and gas activities are anticipated to impact 37,769 acres throughout the Planning Area; however, not all of the Planning Area is ABB habitat. *See* ICP, pg. 39. Instead, oil and gas activities are expected to impact 32,234 acres of ABB habitat. *See id.* These references must be removed from the EA because oil and gas activities may proceed in unsuitable or unoccupied ABB habitat regardless of whether the Service authorizes incidental take of ABB.

> *Service Response to EA Comment 2*: The Service has modified the language within the EA to state that 37,569 acres would be directly impacted by oil and gas activities (instead of "covered activities"). The oil and gas activities are part of the No Action Alternative, and are likely to occur whether the ICP is approved or not. We are required under NEPA to analyze the effects of our action on the human environment – not just on ABB habitat – within the Planning Area.

EA Comment 3 *(Devon III-B)*: The EA repeatedly asserts that approval of the ICP will impact areas with land cover that is unsuitable ABB habitat. For example, the EA repeatedly suggests that approval of the ICP will impact cropland. EA, pg. 4-10 ("impacts to land for cultivated crops should be short term"), 4-29 ("impacts on crops would also be minor as new pipelines would be buried underground, allowing for crops to be planted and harvested following installation of the new pipeline"). Likewise, the EA suggests that approval of the ICP will impact urban areas. *See* EA, pg. 4-11 ("New pipelines, well pads, and associated facilities in . . . urban areas would have much less potential impact than new projects crossing or within forested areas."). The EA also concludes that approval of the ICP will directly impact wetlands within the Planning Area. *See* EA, pg. 4-13 ("Direct impacts to wetlands resulting from oil and gas activities would be associated with geophysical exploration, construction of new facilities, and maintenance of existing facilities."). The ICP, however, clearly explains that cultivated crops. urban areas, and wetlands do not provide suitable habitat for the ABB. ICP, pgs. 34– 36; *see also* ABB Oklahoma Presence/Absence Live-trapping Survey Guidance, pgs. 1–2; ABB Impacts Assessment for Project Review, pg. 5. Operators need not obtain authorization to incidentally take ABB before proceeding with activities in these areas. (Other authorizations may be required that are not provided by the ICP, as noted below in Comment 3 below.) S*ee* ABB Impacts Assessment for Project Review, pg. 10. Accordingly, approval of the ICP, or approval of any other authorization to take ABB,

will not affect whether oil and gas activities proceed in these areas. The EA should be revised to make clear that no impacts to these areas will result from approval of the ICP.

> *Service Response to EA Comment 3*: The Service analyzed the Proposed Alternative (approval of the ICP and subsequent issuance of Permits) as compared to the No Action Alternative. The impacts described in the comment above are part of the No Action Alternative, and are likely to occur whether the ICP is approved or not. While the ICP clearly states that certain areas are not suitable habitat for the ABB, we are required under NEPA to analyze the effects of our action on the human environment – not just on ABB habitat - within the Planning Area..

EA Comment 4 (Devon III-C): The EA erroneously suggests that approval of the ICP would cause oil and gas activities with a federal nexus to proceed. For example, the EA states that approval of the ICP would directly impact wetlands. *See* EA, pgs. 4-13 – 4-14. Similarly, the EA indicates that oil and gas activities would occur in areas of tribal jurisdiction, which may include Indian lands. *See id.* at pgs. 4-36–4-37. Moreover, the EA suggests that oil and gas activities could occur on lands managed by the National Park Service and the U.S. Forest Service. *See id.* at pgs. 4-30 ("applicants would coordinate with the appropriate government agencies to avoid or minimize conflicts with existing or planned parks and/or recreational areas that are located within their individual incidental take permit areas").

The EA overlooks that these activities likely have a federal nexus and thus may be subject to section 7 of the ESA. Oil and gas activities that impact wetlands may require a permit under section 404 of the Clean Water Act. *See* 33 U.S.C. § 1344. Oil and gas activities on Indian lands may require approval of an application for a permit to drill from the Bureau of Land Management. *See* 43 C.F.R. pt. 3160; Onshore Oil & Gas Order No. 1, 72 Fed. Reg. 10,328 (May 7, 2007). Likewise, oil and gas activities on lands managed by the National Park Service or Forest Service may require authorizations from these agencies. These federal approvals are subject to the obligations in section 7 of the ESA. *See* 16 U.S.C. § 1536(a); ABB Impacts Assessment for Project Review, pg. 8–9. Therefore, these activities with a federal nexus are outside of the scope of the ICP. *See* ICP, pg. 5 ("Projects that have a Federal nexus, including those authorized, funded, or carried out by a Federal agency, should address their incidental take of listed species through consultation with the Service under Section 7 of the ESA, and are therefore not addressed here."). Accordingly, approval of the ICP will have no bearing on whether these oil and gas activities proceed. The EA must be revised to reflect that approval of the ICP will not necessarily cause oil and gas activities to proceed in wetlands, on Indian lands, or on lands managed by the National Park Service or Forest Service. (However,

the EA should analyze whether indirect impacts to wetlands and tribal lands will occur as the result of approval of the ICP.)

> *Service Response to EA Comment 4*: The impacts described in the comment above are part of the No Action Alternative, and are likely to occur whether the ICP is approved or not.

EA Comment 5 (Devon III-D): Section 4.9.2 of the EA addresses "noncovered, protected species" and includes candidate species and species proposed for listing under the ESA among these "protected" species. *See* EA, pg. 4-23. The characterization of candidate species and species proposed for listing as "protected" species suggests that the ESA prohibits take of these species. The EA should clarify that take of these species is not prohibited.

> *Service Response to EA Comment 5*: The Service has removed the word "protected" from Section 4.9.2 and other locations within the EA. The Service has provided the *Take Avoidance Measures for Non-Covered Species* as recommendations to project proponents conducting oil and gas activities within the ABB range in Oklahoma. These measures include proposed species, as the Service must consider impacts to these species when conducting Section 7 consultation on our action. The ESA does not prohibit take of proposed species, however, avoidance of these species is required for participation within the ICP developed by the Service.

EA Comment 6 (Devon III-E): The ICP requires participants to implement minimization and mitigation measures to reduce the impacts of unavoidable take of the ABB. The ICP does not impose avoidance measures. Accordingly, references to avoidance measures that appear throughout the EA should be removed. *See* EA, pgs. 4-12, 4-19, 4-23, 4-28, 4-31, 4-37, 5-7.

> *Service Response to EA Comment 6*: Some references to avoidance measures are to other federally listed species. While there are no required avoidance measures for Permit issuance of the ABB, Permittees do agree to avoid take of other species. The Service has removed references to required avoidance measures for the ABB within the EA.

EA Comment 7 (Devon III-F): The need for the proposed action observes: "Implementing the ICP would eliminate need for processing multiple, individual Habitat Conservation Plans (HCPs) and reduce workload associated with processing incidental take permit requests from the oil and gas industry." This discussion should also note two

additional and related needs for the proposed action. First, the proposed action is needed to coordinate authorizations of incidental take of the ABB and avoid piecemeal take authorizations. Second, the proposed action is needed to ensure that consistent mitigation and minimization measures are implemented to yield the greatest conservation benefit for the ABB.

> *Service Response to EA Comment 7*: The Service has removed reference to workload as a reason to approve the ICP. The Service agrees that the ICP ensures consistent mitigation and minimization measures for the ABB related to oil and gas activities and therefore has added this need. However, the Service does not agree that the ICP is needed to coordinate authorizations of incidental take of the ABB and avoid piecemeal take authorizations.

EA Comment 8 (Devon III-F): The EA states: "[T]he planning regions of the Planning Area on average consist of approximately 15 percent cropland, 20 percent forest cover, and 26 percent pastureland (Figure 3-2)." The Service should compare these figures with the land uses described in Table 1 of the ICP and ensure the figures are consistent. *See* ICP, pgs. 34–36. There appears to be some conflict between the land uses described in the EA and ICP. For example, the EA states that 15 percent of planning regions of the Planning Area consist of cropland, but Table 1 of the EA states that 1.1 million acres, or six percent, of the Planning Area are cultivated crops. *Compare* EA, pg. 3-24 *with* ICP, pg. 36. The Service should reconcile these figures or explain how they are consistent.

> *Service Response to EA Comment 8*: The information summarized within the EA is from Natural Resources Conservation Service reports, which divided Oklahoma in multiple regions. The information use within the ICP was from National Land Cover Database GIS information. The definitions of each category are slightly different, thereby not allowing equal comparison. Additionally, the Table on pg. 3-24 of the EA shows averages of percentage land use in each region, as opposed to the overall percentage for the Planning Area. The Service believes that the background and explanations provided within the EA and ICP are sufficient to describe the differences between the information provided.

EA Comment 9 (Devon III-F): The EA suggests that hydraulic fracturing and/or underground injection of wastewater may result in increased seismic activity. The EA, however, cites no empirical evidence sufficient to support a conclusion that hydraulic fracturing or underground wastewater injection induces seismic activity.

> *Service Response to EA Comment 9*: The EA cites several sources for the

viewpoints related to seismic activities and hydraulic fracturing and/or injection of wastewater. See Section 4.1.1 and references to Ellsworth 2013 and USGS 2014.

EA Comment 10 (Devon III-F): The EA states: "During pipeline construction, water may be withdrawn for hydrostatic testing, hydraulic fracturing, horizontal drilling operations (to prepare drilling mud, and dust control along the construction rights-of-way." Hydraulic fracturing and horizontal drilling operations are activities associated with drilling and completing oil and gas wells, not pipeline construction. The EA should be revised to correctly associate these activities with the drilling and completion of oil and gas wells.

Service Response to EA Comment 10: The Service agrees and has added language to indicate that water associated with hydrostatic testing, hydraulic fracturing, and horizontal drilling is associated with pipeline construction or drilling/well development.

EA Comment 11 (Devon III-F): The EA asserts that hydraulic fracturing "may cause" impacts to groundwater. The EA does not cite, and Devon is not aware of, any empirical evidence sufficient to support a conclusion that hydraulic fracturing impacts groundwater.

Service Response to EA Comment 11: The Service has modified language to indicate add that "Concern exists" that hydraulic fracturing fluids may cause contamination both as it is injected under high pressure into the ground and as it returns to the surface, as opposed to stating that it may cause it.

EA Comment 12 (Devon III-F): The EA asserts that waste gas from oil and gas production may be flared and converted to sulfur dioxide and nitrogen oxides, which "may dissolve in moisture in the atmosphere forming acidic droplets that may contribute to the formation of acid rain." Devon is not aware that these effects of flaring have been observed and believes these statements may be speculative.

Service Response to EA Comment 12: The Service provided a reference related to acidic rain formation.

EA Comment 13 (Devon III-F): When assessing impacts of the ICP on vegetation, the EA correctly notes that vegetation types within ABB habitat would be preserved as the result of the ICP. The EA should also note that where temporary and permanent cover change impacts occur to vegetation in ABB habitat, the ICP requires that vegetation be

restored within five years of the impact.

Service Response to EA Comment 13: The Service has added language referring to restoration of vegetation for temporary and permanent cover change impacts in the EA.

EA Comment 14 (Devon III-F): The EA incorrectly suggests that approval of the ICP may lead to the spread of invasive weeds, stating: "Spread of invasive nonnative species could also result from vegetation clearing." When temporary or permanent cover change impacts will occur, however, the ICP requires Permittees to restore vegetation and, in doing so, avoid invasive species. ICP, pg. 45. Furthermore, the ICP includes response actions that will be implemented if invasive species adversely affect ABB habitat on lands with restored vegetation. *See* ICP, pg. 56. Accordingly, the ICP minimizes the potential for invasive species to impact areas where vegetation was cleared. The EA should be revised to reflect the ICP's measures to minimize the potential for invasive species.

Service Response to EA Comment 14: The Service has added language referring to the measures related to invasive species within the EA.

EA Comment 15 (Devon III-F): The EA erroneously states that, under the no-action alternative, operators would implement measures required by the ICP in the event of changed circumstances. Specifically, the EA states: "any potential increase in fire ant populations would be minimized by the avoidance, minimization, and conservation measures described in Section 5.1.6 of the ICP (emphasis added)." This reference appears to be a typographical error. Section 5.1.6 of the ICP outlines responses to a changed circumstance (the Service determines that invasive species are adversely affecting the ABB) that may be implemented under the ICP. Presumably, however, oil and gas operators would not implement the ICP and a response to changed circumstances under the no-action alternative. The EA should be revised to remove this statement from the discussion of the no-action alternative or, if the Service retains this statement, clarify the intent of this statement.

Service Response to EA Comment 15: The Service has removed the language referring to Section 5.1.6 from page 4-18 in the EA.

EA Comment 16 (Devon III-F): The Service should review the discussion of impacts from oil and gas activities on the ABB that are outlined in the EA and compare it to the discussion of anticipated effects of the ICP on the ABB outlined in Section 3.2 of the ICP. The Service should ensure that anticipated effects that are outlined in the ICP are

also incorporated in the EA.

Service Response to EA Comment 16: The Service has reviewed the Section 4.9.1 in the EA and Section 3.2 of the ICP and ensured consistency.

EA Comment 17 (Devon III-F): The EA incorrectly states that "any impacts to habitat of noncovered, protected species that are federally listed as threatened or endangered would require authorization with the Service . . ." (emphasis added). Not all impacts to habitat constitute take; take results from "significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife." 50 C.F.R. § 17.3. The statement in the EA should be revised to state that "impacts to habitat of noncovered, protected species that rise to the level of take. . . ."

Service Response to EA Comment 17: The sentence Devon is referring to states "any impacts to habitat of noncovered, protected species that are federally listed as threatened or endangered would require authorization through coordination with the Service on a project-by-project basis, if projects have the likelihood of resulting in take." The Service believes the qualifier, "if projects have the likelihood of resulting in take" addresses Devon's concerns and recommended edit. Therefore, no additional edits were made to this language.

EA Comment 18 (Devon III-F): The EA states that "where covered activities could directly impact federally listed species not covered under the ICP, the applicants would coordinate with the Service to determine how to gain authorization for potential take of these species" (emphasis added). This statement should be revised in two ways. First, the phrase "directly impact" should be replaced with the word "take." Not all impacts to listed species rise to the level of "take." Second, the phrase "potential take" should be replaced with the word "take."

Service Response to EA Comment 18: The Service has made the recommended language changes.

EA Comment 19 (Devon III-F): The EA should explain the basis for its conclusion that, under the no-action alternative, some projects would significantly impact cultural resources. Under the no-action alternative, oil and gas operators would either avoid impacts that result in take of the ABB or would receive authorization for incidental take from the Service after developing an HCP. If operators avoid impacts to the ABB by foregoing planned development, presumably cultural resources would not be impacted. If operators developed HCPs and received incidental take authorization from the Service, Section 106 of the NHPA would apply and require the Service to identify historic

properties and avoid, minimize, and mitigate adverse effects to them. *See generally* 36 C.F.R. part 800. Therefore, it would seem that adverse effects to cultural resources likely would not occur under the no-action alternative. The Service should explain its basis for concluding otherwise or revise the EA accordingly .

> *Service Response to EA Comment 19*: Devon incorrectly assumes that all impacts to cultural resources discussed in the Planning Area would be regulated under NHPA. As a general matter, Federal law does not impose protections or limits on disposal of cultural resources on private property, and as stated earlier, not all areas in the Planning Area are considered ABB habitat and therefore would not need authorization for incidental take, which translates to a Federal undertaking by the Service. The Service assumes that compliance with all applicable local, state, and Federal laws and regulations pertaining to cultural resources would still occur. Cultural resources identified on private land may be protected under state and local laws, which may require a landowner to take certain steps in order to comply with those laws, but since NHPA may not apply outside of ABB habitat, we may assume that impacts under the No Action Alternative may be significant. We have clarified the language in the EA.

EA Comment 20 (Devon III-F): The EA should be revised to correctly describe the requirements of the NHPA. First, the following statement is imprecise: "Federal regulations established under Section 106 of the National Historic Preservation Act of 1966, as amended, provide standards for considering the severity of possible direct and indirect impacts." The Section 106 regulations do not provide standards for evaluate effects to historic properties. A more accurate characterization of the Section 106 regulations would state: "Federal regulations at 36 C.F.R. part 800 set forth procedures that define how federal agencies meet their obligations under Section 106 of the National Historic Preservation Act to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on such undertakings."

> *Service Response to EA Comment 20*: The Service has corrected the language as recommended.

EA Comment 21 (Devon III-F): The following statement is imprecise: "According to the Secretary of the Interior's regulations for protection of historical and archeological resources (36 CFR 800), adverse impacts may occur directly or indirectly when a project causes changes in archeological, architectural, or cultural qualities that contribute to a resource's historic or archeological significant." This definition of "adverse impacts" is not found in 36 C.F.R. part 800. Rather, the regulations provide that an "adverse effect is

found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(a)(1).

> *Service Response to EA Comment 21*: The Service has corrected the language in the EA.

EA Comment 22 (Devon III-F): The EA states that, "to participate in the ICP, applicants must agree to conduct an historical/cultural review of their project site and work with State Historical Preservation Officer/Tribal Historical Preservation Officer to overcome any significant impacts; avoid any impacts to Indian sacred sites; and not limit access to Indian sacred sites on Federal lands." This language misstates the requirements of both the NHPA and Executive Order No. 13007, 61 Fed. Reg. 26,771 (May 29, 1996), and must be revised.

The statement that applicants "must agree to conduct an historical/cultural review of their project site and work with State Historical Preservation Officer/Tribal Historical Preservation Officer to overcome any significant impacts" appears to derive from the NHPA; however, this statement does not fully capture the NHPA's requirements. For example, the NHPA requires the identification of historic properties within the area that potentially may be affected by a project, not just the project site itself. *See* 36 C.F.R. §§ 800.4(a). Similarly, the NHP A requires avoidance, minimization, and mitigation of "adverse effects" to historic properties, not "significant impacts." 36 C.F.R. §§ 800.5, 800.6. Rather than attempting to restate the complex requirements of the NHPA, the EA should include a simple statement to the following effect: "to participate in the ICP, applicants must agree to work with the Service, State Historic Preservation Offices, and Tribal Historic Preservation Officers to assist the Service in fulfilling the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations at 36 C.F.R. part 800. Compliance with Section 106 requires identification of historic properties in areas affected by the federal authorization and implementation of measures to avoid, minimize, and mitigate adverse impacts to historic properties."

> *Service Response to EA Comment 22*: The Service remains legally responsible for all required findings and determinations associated with the NHPA review and compliance process. However, , to participate in the ICP, applicants must agree to work with the Service, State Historic Preservation Offices, and Tribal Historic Preservation Officers to assist the Service in fulfilling the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its

implementing regulations at 36 C.F.R. part 800.

EA Comment 23 (Devon III-F): The EA's statement that applicants must "avoid any impacts to Indian sacred sites" and "not limit access to Indian sacred sites on Federal lands" appears to derive from Executive Order No. 13007, which imposes obligations on federal agencies when managing federal lands. Section 1(a) of the Executive Order states: "In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." The language of the EA should be aligned with the responsibilities imposed on the Service by the Executive Order.

Service Response to EA Comment 23: The Service has corrected the language in the EA as recommended.

Eligibility Determination for the ABB ICP Comments

Eligibility Determination Comment 1 (Devon IV-A): Question 7 misstates the requirements of both the NHPA and Executive Order No. 13007, 61 Fed. Reg. 26,771 (May 29, 1996), and must be revised. First, Question 7 asks applicants to "agree to conduct an historic/cultural review of your project site and work with the State Historic Preservation Office and Tribal Historic Preservation Officers to overcome any significant impacts." This request appears to derive from the NHPA, but does not fully capture the NHPA's requirements. For example, the NHPA requires avoidance, minimization, and mitigation of "adverse effects" to historic properties, not "significant impacts." 36 C.F.R. §§ 800.5, 800.6. Rather than attempting to restate the complex requirements of the NHPA, Question 7 should include a simple statement to the following effect: "Do you agree to work with the Service, State Historic Preservation Offices, and Tribal Historic Preservation Officers to assist the Service in fulfilling the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations at 36 C.F.R. part 800? Compliance with Section 106 may require cultural surveys of areas affected by your project and implementation of measures to avoid, minimize, and mitigate adverse impacts to historic properties."

Service Response to Eligibility Determination Comment 1: The Service remains legally responsible for all required findings and determinations associated with the NHPA review and compliance process. However, to participate in the ICP, applicants must agree to work with the Service, State Historic Preservation

Offices, and Tribal Historic Preservation Officers to assist the Service in fulfilling the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations at 36 C.F.R. part 800.

Eligibility Determination Comment 2 (Devon IV-A): Question 7 asks applicants to "avoid any impacts to Indian sacred sites" and "not limit access to Indian sacred sites on Federal lands." These criteria appear to derive from Executive Order No. 13007, which imposes obligations on federal agencies when managing federal lands. Section 1(a) of the Executive Order states: "In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." The language of Question 7 should be aligned with the responsibilities imposed on the Service by the Executive Order.

Service Response to Eligibility Determination Comment 2: The Service has corrected the language as requested.

Eligibility Determination Comment 3 (Devon IV-A): In the event the criteria listed in Question 8 are met and a federal authorization (other than the incidental take authorization) is necessary for the project to proceed, the project is ineligible for incidental take authorization through the ICP. Question 8 asks whether a project will be on ecologically significant or critical areas under federal ownership or jurisdiction, including parks, recreation areas, refuge lands, wilderness areas, wild or scenic rivers, national natural landmarks, aquifers, wetlands, national monuments, and other such areas. ABB ICP Eligibility Determination, pg. 3. If so, Question 8 asks the project proponent to "agree to work with managing entities and meet their requirements"; the ABB ICP Eligibility Determination then directs that if the proponent can agree to this term, the project may continue. *See id.* ("If yes, proceed to step 9."). However, if a project will be on areas under federal ownership or jurisdiction and a federal authorization (other than authorization of incidental take of ABB) is required for the project to proceed, the project is outside of the scope of the ICP. *See* ICP, pg. 5 ("Projects that have a Federal nexus, including those authorized, funded, or carried out by a Federal agency, should address their incidental take of listed species through consultation with the Service under Section 7 of the ESA, and are therefore not addressed here."). Question 8 should properly instruct project proponents that if development will be on one of the identified areas under federal ownership or jurisdiction and will require federal authorization to proceed, the project is ineligible for the ICP.

Service Response to Eligibility Determination Comment 3: The Service agrees that projects with a Federal nexus should consult under Section 7 of the ESA instead of the ICP. We have added language to Question 8 to alert project proponents that may a Federal nexus may exist for projects occur under land with federal ownership or jurisdiction.

Eligibility Determination Comment 4 (Devon IV-A): Notably, the Service's rationale for inquiring about the criteria listed in Question 8 is unclear. These criteria are the extraordinary circumstances that preclude the Department of the Interior's application of a categorical exclusion under NEPA. *See* 40 C.F.R. § 1508.4; 43 C.F.R. § 46.215. The Service, however, is not categorically excluding activities for which take is authorized by the Permit from NEPA analysis (In fact, the Service may only categorically exclude activities that it or the Department has specifically identified in its guidance. *See* Dep't of the Interior Manual, pt. 516, ch. 8 § 8.5; 43 C.F.R. § 46.25. The Service has not suggested that IPPs or the activities covered by an IPP are among the activities that it may categorically exclude from NEPA analysis). Rather, the Service has elected to prepare an EA to analyze the potential impacts of approving the ICP. *See* Memorandum from H. Dale Hall, FWS Director to Asst. Reg'l Directors, Final General Conservation Plan Policy (Oct. 5, 2007) ("the Service will prepare . . . one NEPA decision document for all of the actions to be covered under the GCP"). Therefore, there is no reason to evaluate the applicability of extraordinary circumstances and this list should be deleted.

Service Response to Eligibility Determination Comment 4: Because the specific location and description of each project permitted under the ICP is currently unknown due to the ICP's programmatic nature, the Service selected to address several NEPA-related issues through the Eligibility Determination. The Service therefore elects to keep this criteria within the Eligibility Determination document.

Individual Project Package (IPP) Checklist Comments

IPP Checklist Comment 1 (Devon IV-B): The heading "Maps and Description of Area of Permit Coverage" is inaccurate because the area to be described is the project area and not the area of Permit coverage. The Service should revise this title to state: "Maps and Description of Area of IPP Approval."

Service Response to IPP Checklist Comment 1: The Service agrees and has revised the IPP Checklist heading to state "Maps and Description of Area of IPP Approval."

IPP Checklist Comment 2 (Devon IV-B): Please see the comments regarding the "operations and maintenance" language on page 67 of the ICP and adjust the discussion on page 3 of the IPP Checklist accordingly.

> *Service Response to IPP Checklist Comment 2*: The Service agrees and has adjusted the language on page 3 of the IPP Checklist according to adjustments made within the ICP.

Species Assessment and Mitigation Calculations (Species Assessment) Comments

Species Assessment Comment 1 (Devon IV-C): Question 3 states that a project will not result in take of ABB if the action area does not include "potentially suitable ABB habitat." The ABB Impact Assessment for Project Reviews uses different terminology to describe "potentially suitable habitat," referring instead to areas "favorable for use by ABB." ABB Impact Assessment for Project Reviews, pg. 8. Because the Species Assessment should use the same terminology as the ABB Impact Assessment for Project Reviews, the reference to "potentially suitable habitat" should be changed to "areas favorable for use by ABB."

> *Service Response to Species Assessment Comment 1*: The Service agrees and has revised the Question 3 to reference "areas favorable for use by ABBs."

ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands (ABB Conservation Strategy)

ABB Conservation Strategy Comment 1 (Devon IV-D): The Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands contains a statement regarding the location of mitigation lands that appears to conflict with a requirement of the ICP. The Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands states: "Greater than or equal to 95% of the proposed mitigation land property must be comprised of ABB habitat and within ABB CPAs." The ICP, however, suggests that all mitigation lands must be within ABB CPAs: "All offsite mitigation provided for the ABB under this ICP must be within an ABB CPA." ICP, pg. 49. The Service must reconcile these requirements.

> *Service Response to ABB Conservation Strategy Comment 1*: The Service has corrected language within the ABB Conservation Strategy to clarify the original intent. "Greater than or equal to 95% of the proposed mitigation land property must be comprised of ABB habitat. All proposed mitigation land property must be within an ABB CPA."

ABB Conservation Strategy Comment 2 (Devon IV-D): The document states: "The Service must approve all mitigation proposals prior to sale." This statement does not clearly explain whether the seller or purchaser of mitigation credits must obtain the approval of the sale of mitigation credits. Presumably, the Service does not intend to obligate purchasers with obtaining approval of mitigation credits because this requirement does not appear in the ICP and its reference documents. The Service must clarify that sellers rather than purchasers must obtain Service approval prior to sale; however, if the Service intends to require that purchasers obtain approval of mitigation proposals prior to sale, the Service must revise the ICP and the supporting documents to highlight this requirement for Permittees.

> *Service Response to ABB Conservation Strategy Comment 2*: Based on the commenter's reference to "credits", the Service assumes the comment is intended to refer to sale and purchase of ABB conservation bank credits. Prior to sale, the seller (i.e., conservation banker) must obtain the Service's approval of mitigation proposals prior to sale. Additionally, the Service approves that the mitigation land is appropriate for use in mitigating impacts. The ICP does state that under "Mitigation Assurances" in Section 7.2.1 that "Permittees must demonstrate adequate funding for mitigation. If conservation banks are the selected mitigation method, documentation of credit purchase or reservation agreements must be provided to the Service prior to final IPP approval and initiation of impacts."

Take Avoidance Measures for Non-Covered Species Related to Oil and Gas Projects within the ABB Range in Oklahoma (Take Avoidance Measures)

Take Avoidance Measures Comment 1 (Devon IV-E): The Take Avoidance Measures for Non-Covered Species direct the preparation of spill prevention and response plans to avoid take of many species. For example, the avoidance measures for the harperella require "frequent inspection of ongoing operations and contingencies for rescue of harperella, as necessary, subject to approval of the Service." Take Avoidance Measures for Non-Covered Species, pg. 17; *see also id.* pgs. 26–27, 34. Similarly, another measure requires training "at least annually" for spill prevention and response teams. *Id.* pgs. 34, 45. However, U.S. Environmental Protection Agency ("EPA") regulations require the preparation of Spill Prevention, Control and Countermeasure Plans and Oil Spill Contingency Plans in certain circumstances and defined the contents of these plans. The Take Avoidance Measures may not alter these regulatory requirements.

> *Service Response to Take Avoidance Measures Comment 1*: The Service's

use of "spill prevention and response teams" discussed within the Take Avoidance Measures is not intended to replace or alter regulatory requirements under the EPA's Spill Prevention, Control, and Countermeasure Plans and Oil Spill Contingency Plan. The Service does feel, however, that avoidance of take for the species within the document is best addressed as described and therefore has not changed language within the document related to spill prevention and response teams.

Take Avoidance Measures Comment 2 (OIPA III-C): In the "Take Avoidance Measures for Non-Covered Species Related to Selected Oil and Gas Projects within the American Burying Beetle Range in Oklahoma", for the gray bat, mitigation measure 9 states "Develop and implement a spill prevention and response plan to contain fuel and other chemicals on-site." This duplicates existing requirements for Spill Prevention Control and Countermeasures plans that are required when fuel and other chemicals are stored on-site. Please revise this requirement to "Develop and implement the required Spill Prevention Control and Countermeasures plan as required for on-site storage of fuel and other chemicals." This comment applies where a spill prevention and response plan requirement to contain fuels and chemicals onsite is identified for the Arkansas River shiner and the Ozark cavefish. It also applies to the same requirement for harparella for the construction/commissioning.

For the operation and/or operation/maintenance of the Arkansas darter, leopard darter, harparella, Neosho madtom, Neosho mucket, Ouachita rock pocketbook, rabbitsfoot, scaleshell mussel, Sprague's pipit, and winged mapleleaf, the spill prevention and response plan requirements do not reference on-site storage of fuels and chemicals, and the intent appears to be a broader protection against operational spills. Therefore it does not duplicate the SPCC requirements.

Service Response to Take Avoidance Measures Comment 2: The Service does not believe there is harm in repeating potential avoidance measures that are also required for the ABB and has therefore elected to leave the language within the *Take Avoidance Measures*. There may be project proponents referring to the *Take Avoidance Measures* that are not Permittees under the ICP and therefore may not already be implementing these avoidance measures for the ABB.

ABB Survey Protocol Comments

ABB Survey Comment 1 (Hall and Howard): Seasonal Parameters, Time of Year for Surveys: "Surveys may continue until the first night when the minimum temperature falls below 60°F after August 31, which signifies the end of the ABB active season". We are

not sure what the Service means by the "end of the ABB active season", but this is a scientifically suspect statement if it is meant to refer to the species' biology. ABBs are clearly active beyond the point at which a single night below 60 degrees F is reached. The implications for shutting down survey activity based upon this metric could result in a reduction in the overall number of surveys conducted. This could be important since the current recovery effort depends almost entirely on industry-related ABB surveys. A reduction in overall survey data then has implications for the Service's CPA calculations; this could lead to a reduction in CPA area merely because of the reduction in surveys conducted. This could lead to a substantial reduction in the period over which proponents can survey for ABB presence.

> *Service Response to ABB Survey Comment 1*: By "end of the season," the Service is referring to the end of the time period that Permittees are permitted to conduct surveys for the American burying beetle. While extending the survey season would allow for additional surveys, the Service believes that the longer the season is extended, the higher the likelihood of surveys providing false negatives of ABB presence as ABB movement may decrease and some individuals may already be buried for the inactive season. This assumption is based on many factors, including the Service's occurrence records and trapping data over the last 10 years providing evidence that the ratio of positive results to negative results increases towards the end of the season, suggesting that these negative results are due to the ABB being unavailable for trapping rather than an absence of occurrence. We know the ABB retreats underground for the winter, but data is lacking as to the cue the ABB uses to become inactive. These restrictions on conducting surveys at the end of the ABB active season apply to presence/absence surveys. Service-approved research projects may be allowed to conduct surveys beyond the time period allowed for presence/absence surveys (conducted specifically to determine whether project activities will likely result in take). The Service believes the number of surveys would likely remain the same as they were prior to the change, or may increase, because the surveys would be done earlier in the season with additional surveys being performed at the end of the ABB season before inactive construction activities.

ABB Survey Comment 2 (Hall and Howard): Trap Deployment; Minimum Survey Effort (Temporal Scale); To determine presence/absence of ABBs, surveyors should set traps for a minimum of five (5) consecutive nights (Bedick et al 2004). This citation of Bedick et al 2004 is not accurate. Bedick did not conduct surveys for 5-nights in this paper, and simply adds in an unsubstantiated ad hocreference to 5-night trapping (probably at the behest of a reviewer) that was not tested empirically in the study. See table 2 of Bedick

2004 for details, and most importantly the methods section for the broader study, in context.

> *Service Response to ABB Survey Comment 2*: Bedick et al. (2004) indicated that "for establishing presence of beetles, maintain traps for a minimum of 3 days; 5 days is better." The Service has added a reference to Butler et al. (2012), who indicated "that the use of five trap nights rather than three would increase the likelihood of capturing beetles." In addition to published literature, species experts (Wyatt Hoback) in Nebraska have confirmed that trapping for 5 nights resulted in additional presence detection over those conducted for 3 nights.

ABB Survey Comment 3 (Hall and Howard): Trap Spacing and Placement; "...and along the upwind edge of the survey area, if possible". This reference to wind direction and trap placement will be unclear and confusing to the proponents. In the previous section the Service describes the radii of attraction of traps, but here you ask the surveyor to (while placing the trap out during the day ostensibly) make assumptions about wind direction at the time when ABBs are active later at night. This will only lead to wild speculation and variance with respect to how traps are deployed. This statement should be removed ASAP.

> *Service Response to ABB Survey Comment 3*: The Service only allows Permitted individuals to conduct ABB surveys. Trap placement must be within the radius of attraction of traps from the area of interest, but Permittees may take wind direction into account within that radius.

ABB Survey Comment 4 (Hall and Howard): Baiting and Checking Traps; "Surveyors should store the bait outside in airtight containers for 3 to 7 days, depending on the temperature and other weather conditions". Again, this statement is not informed by practice or science, and should be amended to read "2-3 days, or until adequately aged to produce a sufficiently robust odor". Leaving a carcass or carrion in a closed container in the Oklahoma summer for 3-7 days will lead to a liquefied emulsion (read, mess) that will not produce a reliable chemical signal over several days. This portion of the ABB survey guidance should be changed BEFORE the current ABB active season.

> *Service Response to ABB Survey Comment 4*: The Service agrees with this statement and has adjusted our protocol recommendations to reflect the heat in Oklahoma.

ABB Survey Comment 5 (Hall and Howard): Processing Captures, Identification and processing of Nicrophorus Species; "ABBs are sensitive to prolonged heat exposure.

Surveyors cannot hold captured ABBs for longer than 30 minutes, preferably much less. If more than 10 minutes is required for processing, surveyors should place ABBs in a hard plastic container with a damp sponge, which should be stored in an ice cooler until processing commences". The Service should include a statement that explicitly advises proponents to keep the container in which ABBs are held out of any direct sunlight.

> *Service Response to ABB Survey Comment 5*: The Service has added a statement to our recommended protocols that explicitly advises proponents to keep the container in which ABBs are held out of any direct sunlight.

ABB Survey Comment 6 (Hall and Howard): Processing Captures, Identification and processing of Nicrophorus Species; "Calipers should be utilized if the surveyor desires to measure the pronotum or other features of individuals." In our opinion this process provides undue stress to the ABBs, replicating in fact an attack by an avian predator. It also introduces wide inter-observer error. The Service should consider having proponents measure pronotal width using images taken in the field on a piece of grid paper and analyzed using the freeware ImageJ (http://imagej.nih.gov/ij/). Simple instructions and procedures for doing so, and that are currently in use by several laboratory groups working with the species, can be provided to the Service.

> *Service Response to ABB Survey Comment 6*: The Service agrees and has discontinued the use of calipers in measuring ABB, instead requiring the use of the grid paper option described.

ABB Survey Comment 7 (Hall and Howard): Processing Captures, Identification and processing of Nicrophorus Species; "Release ABBs near (within 609 meters/2,000 feet) the transect where they were captured...".This distance nearly equals the effective trap radius noted in the Trap Spacing and Placement section. We would encourage the Service to reduce this to within 200 meters of the site of capture, which is only 25% of the trap radius, and would keep the animal in the area in which it was captured and reduce the influence of unintended anthropogenic relocation.

> *Service Response to ABB Survey Comment 7*: Without information on the size of an individual ABB's home range this distance will remain an assumption. This distance is related to the effective area of the trap. It is reasonable to assume that if a trap can lure ABBs from this distance, then this distance could be considered within the standard area of movement of that individual. This activities description allows for moving ABBs within the effective radii of the trap.

ABB Survey Comment 8 (Hall and Howard): Reporting Procedures; Surveyors should collect the necessary precipitation, temperature, and wind information from the weather station closest to the survey site, which can be found at http://www.wunderground.com/history/ (or other appropriate weather- reporting website, such as a Mesonet site that would provide the required data). This is perhaps the portion of the revised ABB survey guidance most in need of an improved solution. WeatherUnderground.com data are generally reported by the non-scientific public, and are known to be unreliable. The Service should find a more reliable source if the data is to be used in any way to inform management or policy. Data from this source would not be admissible in a scientific study, which leads to the question of why the Service would require that it be collected. Mesonet data is more reliable, is admissible in scientific research, but sites may not necessarily be close to a survey. It should also be noted that even highly reliable Mesonet data, with respect to soil moisture (i.e. 2-inch Fractional Water Index), cannot and should not be used to estimate soil moisture values at a site any distance from the Mesonet sensor. Soilmoisture is a microclimate parameter, and thus data from a site even within a mile of a Mesonet station will likely be quite different than that measured at the station. Again, this would not be admissible in a scientific study, and thus its collection with the intent to inform any management or policy is deeply questionable. In the absence of asking proponents to collect local weather data with a remote data logging solution (such as a Kestrel/Hobo data collecting unit) perhaps revise these guidelines to specify the use of the closest Mesonet station. This portion of the ABB survey guidance should be changed BEFORE the current ABB active season.

> *Service Response to ABB Survey Comment 8*: Surveyors have been informed that the soil moisture field is not a required field in the collection data form at this time. Although Mesonet stations are more reliable than weatherunderground stations,they are greatly limited in their geographic distribution. While Oklahoma has many Mesonet stations, other states that contain ABBs do not. At this point, the Service believes that both Mesonet and/or weatherunderground data provides enough data to use when collecting presence/absence data. The Service is considering requiring data loggers during surveys such as those mentioned within the comment to help test hypotheses regarding the moisture needs of the ABB.

ABB Survey Comment 9 (Hall and Howard): Location Data; "At each trap, a GPS location (in decimal degrees, NAD 83) and digital photograph must be taken to document the location of the trap and the general habitat characteristics of the trap site". The Service should specify the parameters of the required digital photograph based upon the proposed use of this digital data. It would be useful to proponents to know acceptable image sizes, DPI, and image format (JPEG, TIFF, etc.) and what exactly needs to be

included in the captured image (scale of image). As included in the draft ICP these parameters remain unaddressed or ambiguous.

> *Service Response to ABB Survey Comment 9*: The Service has added the requirement that digital photographs be submitted in JPEG format. The purpose of these photographs is to establish the site characteristics of the trapping site to ensure traps are set in favorable ABB habitat and support baseline data for the project proponent's restoration activities following disturbance.

ABB Survey Comment 10 (Hall and Howard): Accidental Death of ABBs. The Service should have all ABB mortalities preserved in either 70% Isopropyl (rubbing alcohol; easier) or preferably 70-90% ethanol (better) rather than preserving as dried specimens. Mortalities thus preserved should then be stored in a freezer until delivered to the Service or Service-approved Facility. This would allow the specimens to be scientifically useful.

> *Service Response to ABB Survey Comment 10*: The Service has replaced the previous guidance on preserving dead specimens with the recommendations above, unless otherwise approved by the Service.

ABB Survey Comment 11 (Hall and Howard): Appendix A: Data Collection Form. Footnote #8 still refers to 3 survey nights; change to 5 survey nights consistent with current protocols.

> *Service Response to ABB Survey Comment 11*: The Service has addressed the footnotes in the Data Collection Form.

ABB Survey Comment 12 (Smith): I do have some concerns about the "2014 American Burying Beetle *Nicrophorus americanus* Oklahoma Presence/Absence Live-trapping Survey Guidance" as the results of these survey methods would be used to determine "occupied ABB habitat" within the ICP. An ideal survey would be able to detect the presence of an ABB, or absence, with 100% certainty. Because the ABB can be lured into a variety of habitat types through trapping, it moves an average of 1.23 km per night, and moves between habitat types (Creighton and Schnell 1998, personal observations), it is unlikely that we will attain 100% certainty of detection.

> *Service Response to ABB Survey Comment 12*: The Service agrees that no presence/absence survey techniques for the ABB at this time can be 100 percent effective at determining presence or absence of ABBs. However, through review of literature and recommendations of species experts, the Service believes that the

presence/absence survey techniques will adequately demonstrate ABB occupancy. Survey techniques will be updated based on the best available science throughout the duration, but independent, of the ICP.

ABB Survey Comment 13 (Smith): Surveys now begin after five consecutive nights when the minimum nightly temperature reaches 60 °F or greater. The survey season may continue until the first night after August 31 when the minimum temperature falls below 60 °F. Will this be based on temperatures during ABB nightly activity (9:00 p.m. until 4:00 a.m.)? I am uncertain how one night with a temperature below 60 °F is enough to drive ABBs to overwinter and make them unavailable during surveys. USFWS documents (USFWS 1991) and the ICP state that "ABBs bury into the soil during the inactive season when ambient nighttime temperatures consistently fall below 60 °F. Dr. Craig Clifford and I completed a small study at Camp Gruber where we trapped ABBs into mid-October. We concluded trapping, not because of failure to catch ABBs, but because of our own time limits. I anticipate that few companies and/or surveyors will complete surveys after August 31 because they risk having an invalid survey after only one night of below 60 °F weather. This functionally cuts out 14-20 days of survey data that would typically be available for decision making. Would you consider either reestablishing a fixed closing date or requiring more consecutive nights of below 60 °F weather to mark the close of the survey season?

Service Response to ABB Survey Comment 13: By "end of the season," the Service is referring to the end of the time period that Permittees are permitted to conduct surveys for the American burying beetle. While extending the survey season would allow for additional surveys, the Service believes that the longer the season is extended, the higher the likelihood of surveys providing false negatives of ABB presence as ABB movement may decrease and some individuals may already be buried for the inactive season. This assumption is based on many factors, including the Service's occurrence records and trapping data over the last 10 years providing evidence that the ratio of positive results to negative results increases towards the end of the season, suggesting that these negative results are due to the ABB being unavailable for trapping rather than an absence of occurrence. We know the ABB retreats underground for the winter, but data is lacking as to the cue the ABB uses to become inactive. These restrictions on conducting surveys at the end of the ABB active season apply to presence/absence surveys. Service-approved research projects may be allowed to conduct surveys beyond the time period allowed for presence/absence surveys (conducted specifically to determine whether project activities will likely result in take). The Service believes the number of surveys would likely remain the same as they were prior to the change, or may increase, because the surveys would be done

earlier in the season with additional surveys being performed at the end of the ABB season before inactive construction activities.

ABB Survey Comment 14 (Smith): The previous presence/absence survey protocols required three consecutive nights of suitable weather conditions. If weather conditions between 9:00 p.m. and 4:00 a.m. were poor, then an additional night of trapping was required. If there were three consecutive nights of poor weather then the survey had to be restarted. I understand that extending the presence/absence survey from three to five nights is presumed to increase detection of ABBs. Bedeck et al (2004) provides a valuable resource on trap design and effectiveness. In that study, they suggest that "for establishing presence of beetles, maintain traps for a minimum of 3 days; 5 is better" but it is unclear what the weather conditions were during those consecutive nights nor do they provide data to support this. A study completed in Nebraska by Hoback (2013) was also used to support the extension of the surveys, but Nebraska does not have the same wind limits that are used in Oklahoma. Perhaps the reason that "5 is better" was because of periods of poor weather during that time.

Service Response to ABB Survey Comment 14: Bedick et al. (2004) indicated that "for establishing presence of beetles, maintain traps for a minimum of 3 days; 5 days is better." The Service has added a reference to Butler et al. (2012), who indicated "that the use of five trap nights rather than three would increase the likelihood of capturing beetles." In addition to published literature, species experts (Wyatt Hoback) in Nebraska have confirmed that trapping for 5 nights resulted in additional presence detection over those conducted for 3 nights.

ABB Survey Comment 15 (Smith): In the ICP "occupied ABB habitat" is defined as areas "suitable for ABB use (containing ABB habitat) and within the effective survey radius of a valid ABB survey where ABBs were identified or ABBs are assumed present". Does this mean that surveyors must know about all other's survey results within 0.5 mile radius of the project? Surveyors are required to submit the survey results to USFWS within 30 days which means that data sharing will have a minimum of a 30 day lag time. Maintaining said database doesn't seem like the best use of the limited USFWS staff. I can understand checking available data before initiating a survey, but must a surveyor monitor the database for the entire survey season? What if a negative survey result occurs, the project is initiated, then at a later date the database shows a nearby positive result? It is prudent to examine a data base to see if nearby surveys negate the need for additional trapping, but it appears impractical to require surveyors to be aware of positive surveys of others after the survey is initiated.

Service Response to ABB Survey Comment 15: The Service has stated that any updates to the ABB survey information will be added to the ABB webpage on at the beginning of the month during the ABB active season. This will allow project proponents to have reasonable access to the survey information but also not require constant checking and updating of the website. However, it is ultimately the project proponent's decision as to the risk of take associated with the activities being conducted. When the Service is reviewing IPPs, we will review the survey data available near the project locations.

ABB Impact Assessment Document Comments

ABB Impact Assessment Comment 1 (Devon II): The Service appears to rely on the Jurzenski dissertation to define ABB range. *See* ICP, pg. 22; ABB Impacts Assessment for Project Review, pg. 4. In defining ABB range, the Service cited the Jurzenski dissertation in support of its assumption that ABB can travel over 29 kilometers in a single night to find carrion. *See id.* The Jurzenski dissertation, however, implicitly recognized that the single ABB that traveled over 29 kilometers was an anomaly by excluding this information from the calculations. Specifically, the dissertation states:

In 2009, 1,097 (561, 529, and 7 undetermined) American burying beetles were captured in Brown, Holt, and Rock Counties, in which 59 recaptures traveled a mean distance of 0.41 (± 1.41 sd) km per night; however, **85%** of the American burying beetles did not move to a different trap (distance equaled zero), and **90%** [emphasis added] traveled 1.6 km or less. In June, one American burying beetle traveled 7.41 km in a single night and another was recaptured 29.19 km east-southeast from the original trap in which it was captured and marked the day before (**this distance was excluded from average distance calculations**) [emphasis added]."

It is unclear why the Service considers the flight of a single ABB in one night of 29.19 km best available science warranting a map change when Jurzenski clearly excluded the information from her calculations. The Service should clearly explain why the map is being changed.

Service Response to ABB Impact Assessment Comment 1: Prior to the most recent ABB range update (within the *ABB Impact Assessment*), the Service included the entire county adjacent to locations where ABBs have been documented.

For the most recent map update, the Service has elected to use a biological basis (recorded movement) instead. The Service based the most recent version of the

ABB range on the maximum movement distance recorded for the ABB (29.19 km, Jurzenski et al. 2011). Although Jurzenski considered this movement an outlier compared to the other data collected, the finding that it is possible for ABBs to move 29.19 km in one night is still valid.

ABB movement studies to date have relied on mark and recapture methods, most of which are based on traps within close proximity to one another (between 20 meters and 5 km; Butler et al. 2012), limiting the distances that could be recorded as potential maximum distances for ABBs. Many ABB studies do not mark ABBs for individual recognition, thus limiting the ability to determine the distances moved by individual ABBs (Creighton and Schnell 1998). To the Service's knowledge, no studies tracking ABB movement through radio telemetry or GPS have been conducted to potentially record real time movements of ABBs, which may provide more reliable movement data.

Because ABBs have been recorded moving 29.19 km in one night (Jurzenski et al. 2011), the Service believes that when identifying potential locations the ABB may occur, this distance from locations where ABBs have been documented should be considered as potentially within the ABB range.

Butler, S. R., R. Harms, K. Farnsworth-Hoback, K. Koupal, J. Jurzenski, W. Hoback. 2012. Standardized capture rates of the endangered American burying beetle, Nicrophorus americanus Olivier (Coleoptera: Silphidae) using different trap protocols. Journal of Insect Conservation. DOI 10.1007/s10841-012-9545-5.

Creighton, J.C. and G. Schnell. 1998. Short-term movement patterns of the endangered American burying beetle *Nicrophorus americanus*. Biological Conservation 86: 281-287.

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Permit Language/Application Comments

Permit Comment 1 (Devon I-C, OIPA II-E): Using ABB habitat as a proxy for measuring incidental take, the draft Permit states that impacts to and loss of ABB habitat may not exceed a cumulative total of 32,234 acres from all Permits issued under the ICP. Permit, pg. 2. In addition to this limitation on impacts to ABB habitat, however, Section I,

Covered Area (Plan Area), of the Permit also constrains the amount of development that may occur in the 35,000-square mile planning area ("Planning Area") for the ICP:

No more than 37,569 acres (15,204 hectares) of the Planning Area will be directly impacted by covered activities: including up to 2,030 miles (3,267 kilometers) of pipeline, 193 miles (311 kilometers) of roads (158 miles (254 kilometers) of permanent roads associated with wells, 30 miles (48 kilometers) of temporary roads associated with wells, and 5 miles (8 kilometers) associated with pipelines) and 3,319 well pads (approximately 4 acres (1.6 hectares) each), and 230 miles (370 kilometers) of electric distribution lines.

Permit, pg. 3. The EA contains similar statements. *See* EA, pgs. 4-1, 4-4, 4-12, 4-20, 4-31, 5-6. Although the ICP anticipates that 37,579 acres will be impacted by oil and gas activities in the Planning Area, the ICP does not limit impacts to this amount. *See* ICP, pg. 38.

The Service may not limit oil and gas activities occurring in the Planning Area but entirely outside of occupied ABB habitat. The ICP assumes that only 85.8 percent of the Planning Area may be habitat for the ABB. ICP pg. 34. The Service has recognized that activities in areas that are not favorable for use by ABB do not result in take of the ABB. Activities may proceed within the Planning Area in areas that are not favorable for use by ABB (as well as in unoccupied ABB habitat) without any need for incidental take coverage. *See* ABB Impact Assessment for Project Review, pg. 10. Accordingly, the Service has no reason or authority to regulate activities occurring entirely outside of occupied ABB habitat. Devon requests that the Service revise the Permit to remove the limitation on impacts in the Planning Area set forth in Section I, Covered Area (Plan Area), of the Permit and remove similar references from the EA.

> *Service Response to Permit Comment 1*: The Service did not intend to restrict the amount of each type of Covered Activity permitted through the ICP. Additionally, the Service does not intend to limit oil and gas activities occurring outside of occupied ABB habitat. Therefore, the Service has corrected language within the example Permit terms and conditions and the EA to match language previously included within the ICP.

Permit Comment 2 (OIPA III-A): Currently, the document entitled "Permit Application Example for ICP" posted on the Service's ABB website supporting the ICP does not adequately consider the programmatic nature of this document or the sequential manner for which an applicant would go about obtaining an Incidental Take Permit (ITP) under the ICP, which would thereafter be followed with a submittal for IPP's. This

document, also identified as Form 3-200-56, requests certain activities, agency approvals, project descriptions, etc. that will not necessarily be attainable by an operator upon initial submittal of an application seeking the ITP. However, if an operator is to follow the general sequential nature of the document suggested by the Service, this document does not facilitate the appropriate timing for project approval.

> *Service Response to Permit Comment 2*: Although the ICP is programmatic in nature, applicants for Permits under the ICP are required to submit Form 3-200-56 in order to apply for a Permit. The Service has provided an example Permit Application Form 3-200-56 on the website with the appropriate boxes and page numbers from the ICP already filled in. Applicants for Permits under the ICP only need to fill out the applicable contact information, follow the example to properly complete the form, and sign appropriate places in blue ink.

Comments Unrelated to ICP/EA/Associated Documents

Unrelated Comment 1 (Oklahoma Department of Wildlife Conservation): It is our understanding that the delay in completion of the GCP is due to a large amount of pending survey data that may demonstrate the presence of ABB outside of the 45 Oklahoma Counties identified within the ICP.

In addition to the ICP and GCP, the ODWC has several concerns pertaining to what we believe is a severely compromised and outdated Recovery Plan for the ABB. The ODWC believes that sufficient data have been collected during the twenty-two years since the ABB Recovery Plan was originally prepared to justify a revision of the Plan and a reevaluation of its reclassification criteria. The existing Recovery Plan has been rendered largely obsolete by new data - the majority of which were compiled in the most recent Five-year Review for the American Burying Beetle that your staff published in 2008. Furthermore, this request is consistent with the recommendations that your staff outlined in the conclusion of the Five-year Status Review. As you are aware, the available biological data in 1989, indicating a species decline to small portions of Rhode Island and Oklahoma, has proven to be incomplete. Multiple surveys during the 1990s and 2000s have documented ABB presence in the eastern 1/3 of Oklahoma along with portions of Texas, Arkansas, Kansas, Nebraska and South Dakota. These post-listing survey data provide further justification in support of our belief that the ABB Recovery Plan and recovery goals should be reassessed because they are no longer based on the best available information.

We believe that the number of ABB distributed across the multi-state area described above exceeds the population size criterion for reclassification. This suggests that a high

degree of population persistence and resiliency exists, which is consistent with the Recovery Plan's reclassification goals. We believe that the Recovery Plan does not fully take into account the recovery benefits of the apparently large and widespread population(s) west of the Mississippi River.

The genetic data that have been collected since the Recovery Plan was developed do not indicate that any substantial regional variation exists across the beetle's geographic range nor that any genetic differentiation exists that could serve as a basis for subdividing the species into separate subspecies that could be managed independently based upon their status. At the same time, these genetic data demonstrate that the four regions that are identified in the Recovery Plan are arbitrary delineations and should be modified or, preferably, eliminated. We contend that the currently occupied range of ABB already encompasses a wide range of ecological systems, including tallgrass prairie, mixed-grass prairie, oak woodlands, southeastern pine woodlands and maritime communities, which reflect much of the habitat diversity found within its historic range. A Recovery Plan that is based upon ecological regions rather than broad geographic regions would provide a framework for more quickly recovering this species. At the very least, it would advance the species closer to its reclassification goal while continuing to meet the goal of a broad ecological representation by beetle populations.

The Oil & Gas Industry Conservation Plan for ABB will provide some conservation benefits toward the recovery of the ABB. To make these conservation gains more effective, we would like to see new criteria incorporated into a revised ABB Recovery Plan that establishes criteria for delisting. We believe that these criteria are a critical component of a revised ABB Recovery Plan because it demonstrates that the Service believes that recovery is an attainable goal and ultimately is committed to recovery and delisting. These criteria also identify what actions are needed for recovery and how conservation partners can work with the Service toward the beetle's recovery goal.

We appreciate your willingness to consider this request. We firmly believe that a thorough and objective re-evaluation of the Recovery Plan will indicate that a delisting of ABB is warranted in the future and we look forward to working with the Service toward this end.

Service Response to Unrelated Comment 1: Thank you for your comment.

Unrelated Comment 2 (OIPA I): Due to the inherit urgency of the industry to obtain a Permit mechanism for the ABB. OIPA accepts that Service developed this ICP based on scientific assumptions the industry may have otherwise challenged. For example, there remains to be a significant variance in the “best available science” and the

transparency of information as it relates to this species. OIPA is hopeful that the Service will continue to enhance the visibility of these materials and be more transparent in their use and justification of available science for this species, and how the use of these assimilated data points from the experts translated into biological goals and conservation strategies implemented for this species.

Service Response to Unrelated Comment 2: Thank you for your comment.

Unrelated Comment 3 (OIPA I-A): When the species was originally listed on July 13, 1989, it was only known to be present in two locations: Block Island, Rhode Island, and one population extending into 4 counties in Oklahoma. In Oklahoma there have now been confirmed occurrences in 29 counties, and the ABB is known to occur in 9 states. Almost all of this expanded range has been identified prior to the elimination of historic avoidance practices (bait away and trap and release). The Service continues to cite "best available science" to eliminate avoidance practices and to apply increasingly stringent mitigation requirements. These increasingly stringent measures are inconsistent with the most significant piece of best available science: that the ABB occurrence expanded dramatically without the use of the newly proposed mitigation and avoidance measures, and therefore historic avoidance practices were adequate to protect the species.

Service Response to Unrelated Comment 3: Thank you for your comment.

Unrelated Comment 4 (OIPA I-C): OIPA would also like to take this opportunity to remind the Service that it has a statutory obligation to conduct a 5-year review of the ABB pursuant to section 4 of the ESA, 16 U.S.C. 1533(c)(2). OIPA would boldly like to remind the Service that they have missed such statutory deadline for conducting the 5-year review, and OIPA is confident that the growing body of biological data concerning the ABB and its ever-expanding range demonstrate **that the species must be downlisted or delisted entirely!**

Service Response to Unrelated Comment 4: Thank you for your comment.